THE INSTITUTE OF LAW RESEARCH AND REFORM
EDMONTON, ALBERTA

MATRIMONIAL PROPERTY: DIVISION OF PENSION BENEFITS UPON MARRIAGE BREAKDOWN

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INSTITUTE OF LAW RESEARCH AND REFORM

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A subcommittee of the Family Law Section of the Canadian Bar Association, Alberta Branch, composed of Ruth Becker (Chairman), and Louise M. Ares, Brenda Kennedy, J.M. McBean, L.J. Smith and

David J. Tilley have given generously of the benefit of their professional experience, for which the Institute is grateful, as well as for their general support of its proposals.

This report, and the opinions and proposals contained in it are, however, the sole responsibility of the Institute.

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MATRIMONIAL PROPERTY:

DIVISION OF PENSION BENEFITS UPON MARRIAGE BREAKDOWN

PART I: SUMMARY OF REPORT

This report recommends better ways for the division of the benefits of a pension plan upon marriage breakdown. It covers all pension plans which fall under provincial jurisdiction or which can be reached by Alberta court orders.

The recommendations which the report makes are designed to achieve fairness between spouses; to avoid or minimize the future entanglement of their financial affairs; to facilitate and encourage settlements; to minimize the financial and emotional costs of the division of matrimonial property; and to protect the interests of employers and other employees in pension plans and pension funds. Because, in our view, it is only what a spouse has accumulated up to the time of division of matrimonial property which is divided, the report recommends against the sharing of post-division increases in a pension benefits, including pension increases resulting from salary increases under a final or best earnings pension plan.

The report recommends that the Matrimonial Property Act be amended so that pension benefits could be divided in the following ways:

(1) Valuation and accounting. The employee spouse would pay the non-employee spouse for the non-employee spouse's share of the pension benefit.

(2) Valuation and division. The pension plan would pay out to or for the benefit of the non-employee spouse an amount equal to the present value of the non-employee spouse's share of the pension benefit.

(3) Provision of a separate pension. The pension plan would provide the non-employee spouse with a separate pension having an actuarial value equal to the actuarial value of the non-employee spouse's share of the pension benefit. The separate pension could start when the employee spouse could first claim a pension under the plan.

(4) Division of proceeds. Either the employee spouse or the pension plan administrator would pay the non-employee spouse's share from each payment which becomes payable under the plan to the employee spouse. The employee spouse would hold the pension benefit in trust to ensure that the payments are made, and would be able to change beneficiaries or make elections only with either the consent of the non-employee spouse or a court order.

At present the only methods available for dividing pension benefits are valuation and accounting and division of proceeds by the employee spouse. These can be effected either by agreement or by court order. They would continue to be available. The new methods of division which the report proposes (valuation and division, provision of a separate pension, and division of proceeds by the pension plan administrator) affect the interests of third parties and would be available only under court order.

An order of preference would be established. The court would be directed to use the first method (valuation and accounting) unless it would cause a result which would not be just and equitable, in which event the court would be directed to use the next method (valuation and division) unless the result would not be just and equitable, and so on. Not every method of division would be practicable in every case.

What an employee spouse would pay to the non-employee spouse under a valuation and accounting and what a pension plan would pay to the non-employee spouse under a valuation and division would depend upon the valuation of the pension benefit. The report recommends that a pension benefit be valued as if the

employee had terminated his employment at the time of the division of the matrimonial property. The valuation would be the greater of two amounts. The first is the amount which the employee spouse would have received from the plan if his or her employment had terminated. The second is the amount equal to the value of the deferred pension which he or she has earned at the time of division. The report recommends the adoption of a method of valuation under which regulations would establish annually the assumptions necessary for valuing deferred annuities and pension plan administrators would provide the actual valuations, thus doing away with the necessity for costly and lengthy court battles over valuation.

Regulations would be promulgated annually which would value deferred pension benefits for the purposes of valuation and accounting and valuation and division, thus avoiding costly and lengthy court proceedings in contested cases.

MATRIMONIAL PROPERTY:

DIVISION OF PENSION BENEFITS UPON MARRIAGE BREAKDOWN

PART II: REPORT

CHAPTER 1. INTRODUCTION

1.1 This is the Institute's final report on the division of pension benefits on the breakdown of marriage, a project which we undertook at the request of the Attorney General. In the text of the report we propose to state our recommendations and to support them with only the baldest statement of our reasons. Draft legislation is attached to the report.

1.2 Our usual practice is to include in a final report a complete statement of the law and of the problems which arise under it, and a complete statement of the reasons for any proposals which we make for reform. We think, however, that extensive supporting material about the complex topic covered by this report would obscure rather than illuminate our recommendations. A reader who wants the supporting discussion and reasoning will find it in our Report for Discussion 2[1] which is available for those who want it either through its original distribution or from the Institute's office. We will in this report make some specific cross-references to the Report for Discussion.

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1 *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown*, Report for Discussion No. 2, 1985.

CHAPTER 2. NEED FOR REFORM

2.1 Under the Matrimonial Property Act (Alberta) the benefit of the rights which a spouse accumulates under a pension plan during marriage is property which is divisible between the two spouses upon marriage breakdown.[2] The Act does not mention pension benefits but the Alberta Court of Appeal has held in Herchuk v. Herchuk[3] and Moravcik v. Moravcik[4] that it nevertheless includes them as "property". In our Report for Discussion, we mentioned a possibility that "a litigant in another case might appeal to the Supreme Court of Canada and that the Supreme Court of Canada might overrule the two decisions of the Court of Appeal." "The possibility seems to us to be remote," we said, "but it cannot be said to be non-existent." Since then the Supreme Court of Canada has refused leave to appeal in a case which raised the issue.[5] The refusal does not entirely dispose of the possibility but it is some confirmation that the possibility is so remote that its existence does not require an amendment to the Matrimonial Property Act.

2.2 Our principal concern, and the reason for this report, is that the methods which the law provides for the division between spouses of the benefit of pension rightsunder pension plans established by employers are not adequate. This is because

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2 See the discussion of this proposition at Report for Discussion No. 2, pages 29-30.

3 (1983) 35 RFL (2d) 327.

4 37 RFL (2d) 102.

5 Cooper v. Cooper Application for leave to appeal from Appeal No. 18721, Alberta, Court of Appeal. Leave refused, May, 1986. Our statement that the issue was raised is based upon information given by counsel.

of pension legislation which protects pension benefits against court process and which prohibits the assignment of pension benefits by employees.

2.3 Under the present law, there are two methods of division of pension benefits under pension plans established by employers. One is valuation and accounting, a procedure under which an employee spouse pays a non-employee spouse in cash or in property for the non-employee spouse's share of the pension benefit.[6] In principle this is a good method. However, present methods of valuation of a pension benefit are expensive, time consuming and difficult, and there are cases in which it is unfair to require an employee spouse to pay from other property for the non-employee spouse's share of a pension benefit. These two difficulties have frequently driven the courts to adopt the second method of division.

2.4 That second method of division which is possible under present law is the division of the proceeds of the pension benefit by the employee spouse under a trust imposed upon him by the Court.[7] Under it the employee spouse must share with the non-employee spouse every payment which is made to the employee spouse under the pension plan. This entangles the financial affairs of the two spouses for life. It makes the non-employee spouse dependent upon events in the life of the employee spouse which are no longer relevant to the needs of the non-employee spouse. It brings the interests of the two spouses into conflict

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[6] Valuation and accounting is described more fully at pages 18-20.

[7] Division of proceeds by the employee spouse is described at pages 28-30.

in respect of pension elections under the pension plan. It exposes the non-employee spouse to the risk of non-payment by the employee spouse and to the risk of having to engage in costly and sometimes ineffective collection procedures. It would be desirable to find a better way of dividing a pension benefit.

2.5 Our recommendations are accordingly directed towards providing a scheme of distribution of the benefit of pension rights on marriage breakdown which will be just and equitable and efficient as between the spouses. The scheme, however, must also recognize the interests of the others who have interests in the employee spouse's pension plan -- the employer, the other employees and the pension plan administrator. Our recommendations are accordingly directed towards providing a scheme which will be just and equitable and efficient with respect to those interests also.

CHAPTER 3. RECOMMENDED METHODS OF DIVISION OF PENSION BENEFITS

A. Guiding principles[8]

(1) General principles

3.1 The Matrimonial Property Act is based upon two principles. The first is that a husband and wife should share between them in a just and equitable way the economic gains which they have made during their marriage. The second is that in the usual case equal sharing is just and equitable. Our proposals do not affect the working of those principles. They come into effect only after the spouses or the Court have decided upon a sharing and upon the fractional share which each spouse should receive. They are intended to avoid or minimize future financial and business relationships between the spouses; to facilitate settlements; to minimize the cost of dividing matrimonial property; to take into account the possible effects of income tax; and to avoid prejudice to the interests of other parties. They are not intended to interfere with any public policies behind pension legislation.

Recommendation No. 1.

We recommend:

(1) that upon marriage breakdown the economic gain represented by the acquisition or an increase in value during marriage of a pension benefit should be divisible between the spouses under and in accordance with the principles of the Matrimonial Property Act and in particular the principle of just and equitable division.

(2) that in giving effect to those principles the following considerations should be borne in mind:

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[8] See Report for Discussion 2, pages 37-41.

(a) that it is desirable to avoid or to minimize future financial and business relationships between the spouses.

(b) that it is desirable to facilitate and encourage settlements.

(c) that it is desirable to minimize the financial and emotional costs of the division.

(d) that income tax consequences of the division of matrimonial property should be taken into account, and that it is desirable to avoid attracting income tax which would not otherwise be payable.

(3) that the rights of third parties should not be prejudiced by the division of a pension benefit between the spouses.

(4) that the division of a pension benefit should not contravene the policy behind pension legislation.

(2) Post-division changes in a pension benefit[9]

3.2 The property which is to be divided under the Matrimonial Property Act is the property which each spouse has at the time of division (except for property owned by a spouse before the time of the marriage or acquired by gift or inheritance). The property which an employee spouse has at the time of division does not include the benefit of post-division improvements in the employee spouse's pension benefit by reason of post-division events, including salary increases.

3.3 The proposition that the non-employee spouse is not entitled to share in post-division improvements is not always beyond controversy. Under a final or best earnings plan, for example, the employee spouse's length of service is multiplied by his or her final or best salary to arrive at his or her pension, and, as has been said: "the [non-employee spouse's] years of

[9] See Report for Discussion No. 2, pages 49-57.

contribution to the marriage partnership are still there in the multiplier, potent in enabling [the employee spouse] to reap benefit" from later progress and increases in salary.[10]

3.4 In our Report for Discussion[11], we pointed out that an employee spouse's earnings can go down as well as up, but thought it reasonable to assume that the earnings of most long-term employees will rise during their working lives to compensate for decreases in the value of money and to share the benefit of increases in individual and general productivity, so that valuing or dividing pension benefits on the basis of employee spouses' retirement final or best earnings would in the great majority of cases result in higher awards to non-employee spouses. We thought, however, that the issue should be decided on principle.

3.5 In the meantime, the Alberta Court of Appeal has commented on the question in Wilson v. Wilson, Appeal #19383, Edmonton, May 16, 1986. In that case, the trial judge had made an order for the division of proceeds by the employee spouse[12]. The employee spouse appealed on the grounds that there should be a division by valuation and accounting. The Court allowed the appeal and amended the Queen's Bench order to permit the husband to make a payment of $14,733.40 in lieu of the pension interest awarded. Although the basis of the computation of the payment does not appear in the reasons for judgment, we understand from

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10 Haldane v. Haldane [1981] NZLR 554 (New Zealand Court of Appeal).

11 Report for Discussion 2, page 50.

12 The Court referred to the order as a "McAlister" form of order after the seminal Alberta case in which a division of proceeds was ordered: See Report for Discussion 2, pages 52-53.

counsel that it was the present value of the pension which the employee spouse had earned at the time of the division of the property and that it did not include any allowance for the possibility that the employee spouse's final earnings would be greater than his current earnings, though the pension plan was a best earnings pension plan.

3.6 In the course of his oral reasons for judgment, Mr. Justice Stevenson, speaking for the Court, said:

> "The next argument was that the judge's decision failed to take into account the fact that the pension benefit would improve from anticipated changes in salary after the property was divided[13]. The pension in question gives a retirement annuity based, in part, on his best earning years. The husband points out that this concern has not been directly addressed in decisions of this court, notably in our decision in Moravcik v. Moravcik (1983) 37 R.F.L. (2d) 102. Counsel referred to the recent discussion paper of the Institute of Law Research and Reform: Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown, Report for Discussion No. 2. As that report points out it would not, in principle, appear to be reasonable to share funds derived from contributions made after the termination of the marriage. There is a tendency in the report and in some judicial decisions to assume that the pensioner's last years will be his or her best years. Moreover, improved salaries in later years may simply be a reflection of inflation rather than any greater value in the services performed. It may be that the court could reserve leave to reapply when the pension falls in if the pensioner can then demonstrate that some additional part of the pension is attributable to post matrimonial property distribution considerations. At the conclusion of a matrimonial property action these items, together with many others, are uncertain, hence a usual order is the one made here."

3.7 The Court appears to have accepted the proposition that later changes in the pension benefit should not be reflected in

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[13] The usual "McAlister" order has the effect of sharing the actual pension received and therefore includes improvements from change. It seems likely that the "decision" referred to in this sentence was an acceptance by the trial judge of a formula for valuation.

the award to the non-employee spouse. That was the effect of the Court's order insofar as the particular case was concerned, and the Court appears from the passage quoted above to have agreed that "...it would not, in principle, appear to be reasonable to share funds derived from contributions made after the termination of the marriage" -- and post-division improvements resulting from salary increases are derived from post-division contributions. However, the Court's comments suggest that when the Court makes a "McAlister" form of order -- i.e., an order for division of proceeds by an employee spouse -- the proper course may be for it to order a sharing of the pension as it is actually paid, including the benefit of any post-division improvements, but to reserve leave for the employee spouse to apply when the pension falls in and to show "that some additional part of the pension is attributable to post matrimonial property distribution considerations". The Court's reason for the comment, as indicated by the passage, is that "improved salaries in later years may simply be a reflection of inflation rather than any greater value in the services performed". Although these comments appear to be obiter dictum because the method of division to which they apply is that chosen by the trial judge and not that chosen by the Court of Appeal, they are, of course, an important indication of the view which the Court of Appeal takes of the effect of the existing law on the subject.

3.8 In the time since our Report for Discussion was issued, we have given much additional thought to the question of post-division changes in an employee spouse's pension benefit. We are all agreed that, in principle, post-division changes should not affect the non-employee spouse's share, whether the

post-division changes are for the better or for the worse.

3.9 A minority of the members of our Board, while accepting that principle, think that there is one kind of case in which it should not apply. That is a case in which a non-employee spouse is compelled to accept a division of proceeds because the employee spouse successfully opposes the non-employee spouse's request for a valuation and accounting. In a case in which it is the employee spouse's exigencies which make it necessary to lock the non-employee spouse into the pension plan, the minority think it unfair that the non-employee spouse should have to sit back and watch the erosion by inflation of the dollars in which his or her share is valued, while the employee spouse, by making additional contributions in depreciated dollars based upon increases in salary, is able to maintain the real value of his or her share. An alternative method of avoiding this result which has been suggested to us is to add to the non-employee spouse's share an amount which would compensate the non-employee spouse for the decrease in the value of money measured by the Consumers' Price Index, subject to a proviso that the share would not exceed the share which would be provided by pro-rating the actual pension received between the married years and the unmarried years.

3.10 However, by a majority, we are of the view that the greater unfairness would be in allowing a non-employee spouse to share in increases in the pension benefit which arise and are paid for after the time of division of the matrimonial property.

Recommendation No. 2.

We recommend that in dividing a pension benefit no

account be taken of an actual or prospective change in an employee spouse's salary after the division unless at the time of the division the employee spouse has a right to receive the increase in salary or the employer has a right to reduce the salary.

[Proposed legislation, s. 18.4]

Recommendation No. 3.

We recommend that in dividing a pension benefit no account be taken of an actual or prospective improvement in the pension plan after the division unless at the time of the division the employee spouse has a right to have the improvement made.

[Proposed legislation, s. 18.4]

B. Pension plans included in proposals

3.11 Our proposals apply to all kinds of pension plans which are established by an employer for all employees or for a class of employees, including defined contribution plans and defined benefit plans.[14] They therefore apply to private pension plans which are required to be registered under the Pension Benefits Act (Alberta)[15]; to the public sector pension plans governed by special Alberta statutes;[16] to non-Alberta pension plans which, under reciprocal agreements, are administered

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[14] See Report for Discussion 2, pages 16-19.

[15] The Pension Benefits Act may be succeeded by a new statute based upon Bill 12 of 1986, the Employment Pension Plans Bill.

[16] The statutes are: the Alberta Government Telephones Act; the Local Authorities Pension Plan Act; the Members of the Legislative Assembly Pension Plan Act; the Public Service Management Pension Plan Act; the Public Service Pension Plan Act; the Special Forces Pension Plan Act; the Teachers' Retirement Fund Act; and the Universities Academic Pension Plan Act.

according to Alberta law for Alberta employees;[17] and to pension plans established or registered by or under statutes which recognize Alberta court orders.[18]

3.12 These are all the pension plans which can be reached by Alberta legislation and which are protected by legislation which protects pension benefits against court process and which prohibits the assignment of pension benefits by employees.

3.13 It should be noted that under the present law the Alberta courts are not necessarily powerless merely because neither Alberta law nor an Alberta court order can reach a pension plan which is governed by the law of another jurisdiction. If an employee spouse is personally subject to the jurisdiction of Alberta courts, the Court of Queen's Bench can order either a valuation and accounting or a division of proceeds by the employee spouse. Our proposals do not affect that power in any way.

Recommendation No. 4.

We recommend that the legislation proposed in this report apply to a pension benefit under any of the following:

(a) pension plans established by or under Alberta legislation, and in particular a pension plan

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[17] These include pension plans governed by the Pension Benefits Standards Act (Canada) and by pension benefits legislation of Manitoba, Newfoundland, the Northwest Territories, Nova Scotia, Ontario, Quebec, Saskatchewan and the Yukon Territory. The same reciprocal agreements would make our proposals inapplicable to non-Alberta employees included in Alberta pension plans.

[18] This category would include pension plans based upon employment in undertakings under federal jurisdiction, "including agents of Her Majesty" but not including civil servants, but it would be available for any other plans which recognize Alberta court orders.

established under The Alberta Government Telephones Act, The Local Authorities Pension Plan Act, The Members of the Legislative Assembly Pension Plan Act, The Public Service Management Pension Plan Act, The Public Service Pension Plan Act, The Special Forces Pension Plan Act, The Teachers' Retirement Fund Act, and the Universities Academic Pension Plan Act.

(b) pension plans which are or ought to be registered under the Pension Benefits Act (Alberta).

(c) pension plans which are covered by reciprocal intergovernmental agreements under which the plans, insofar as they cover Alberta employees, are to be administered in accordance with Alberta law.

(d) pension plans which are established or registered by or under statutes which recognize Alberta law or Alberta court orders.

[Proposed legislation, s. 18.1(e)]

C. Implementation of proposals

3.14 What is to be divided between a husband and wife upon marriage breakdown is all the economic gains which they have made during the marriage. The division of a pension benefit should be considered only in that context. All the law about the division of matrimonial property should be in one place. We recommend that the Matrimonial Property Act be amended to give effect to the proposals which we make in this report and that the amendments be given overriding effect with respect to the pension legislation. We attach a draft of legislation which would do so.

Recommendation No. 5.

We recommend that, in order to give effect to the proposals made in this report,

(a) the Matrimonial Property Act be amended along the general lines indicated by the proposed legislation attached to this report, and

(b) that the amending legislation be given overriding effect with respect to pension legislation.

[Proposed legislation, s. 18.1(2), s. 18.2(2)]

D. Summary of proposals

3.15 In this chapter we will recommend that the law provide five ways of dividing pension benefits. We will describe the five ways below. We will list them here, calling them by names which we have devised for this report.

3.16 The five methods of division are as follows: (1) valuation and accounting; (2) valuation and division; (3) provision of a separate pension for the non-employee spouse; (4) division of proceeds by the pension plan administrator; and (5) division of proceeds by the employee spouse.

Recommendation No. 6.

We recommend that the following methods of division of a pension benefit be used:

(1) a valuation and accounting, under which the employee spouse would retain the pension benefit and compensate the non-employee spouse for the appropriate share of the pension benefit.

(2) a valuation and division, under which the pension plan administrator would

(a) pay for the benefit of the non-employee spouse the present value of the share in the pension benefit which the non-employee spouse is entitled to receive, and

(b) reduce the employee spouse's pension benefit to reflect the payment.

(3) the provision of a separate pension for the non-employee spouse, under which the pension plan administrator would

(a) pay to the non-employee spouse, on or after the earliest date at which the employee spouse could

claim a pension and before the employee spouse's pension starts, a pension of a kind which is provided for under the pension plan which would have an actuarial value that is equal to the non-employee spouse's share of the pension that the participant spouse could have claimed on that date, and

(b) reduce the employee spouse's pension benefit to reflect the payment.

(4) a division of the proceeds of the pension benefit by the pension plan administrator.

(5) a division of the proceeds of the pension benefit by the employee spouse.

[Draft legislation, s. 18.2(1)]

3.17 Each of these five methods could be used under either a defined contribution plan or a defined benefit plan. We will now describe each of them in greater detail.

E. Methods of division

(1) Valuation and accounting

3.18 Under a valuation and accounting, the employee spouse retains the pension benefit and pays the non-employee spouse in money or property for the non-employee spouse's share.

3.19 The steps in a valuation and accounting are as follows: (a) the matrimonial property which is to be divided by valuation and accounting is listed and valued; (b) the spouse whose present share of the total is greater than the share awarded to that spouse by the Court makes a payment of money or a transfer of property to the other so that each has the share awarded.

Example: The matrimonial property of the employee spouse E and the non-employee spouse S referred to in Table 1 at page 72 is being divided between E and S at age 40 in equal shares. The matrimonial property is as follows:

	Owned by E	Owned by S
Pension benefit	17,838	
Securities	50,000	
Equity in matrimonial home		40,000
Totals	67,8388	40,000

The value of E's property is $27,8388 greater than the value of S's property. Under a valuation and accounting E should turn over to S cash or property having a value of half of the difference, or $13,919.9. If E transfers to S securities having that value the property would then be owned as follows:

	Owned by E	Owned by S
Pension benefit	17,838	
Securities	36,081	13,919
Equity in matrimonial home		40,000
Totals	53,919	53,919

3.20 The same example would apply to a division of matrimonial property involving a defined contribution pension plan if the value of the pension benefit was the same.

3.21 A valuation and accounting can be effected either by Court order or by the spouses without a Court order. It can be effected at any stage of an employee spouse's rights under a pension plan. It applies to defined contribution plans as well as to defined benefit plans.

Recommendation No. 7.

We recommend that the Court continue to have power to order a valuation and accounting.

[Draft legislation, s. 16.2(1)(a)]

(2) Valuation and division

(a) Description

3.22 Under a valuation and division the present value of the pension benefit as it exists as the time of the division of the matrimonial property would be divided between the employee spouse and the non-employee spouse, an amount equal to the value of the non-employee spouse's share being paid from the pension fund to or for the non-employee spouse. We attach as Appendix A a specimen of an order which would provide for a valuation and division.

3.23 The steps would be as follows: (a) the pension benefit would be valued; (b) the value of the fraction of the pension benefit which is the non-employee spouse's share would be computed; and (c) the pension plan administrator would pay to the non-employee spouse, or into a Registered Pension Plan or a Registered Retirement Savings Plan for the benefit of the non-employee spouse, an amount of money equal to the value of the non-employee spouse's share of the pension benefit.

> Example: The matrimonial property of the employee spouse E and the non-employee spouse S referred to in Table 1 at page 72 is being divided between them at age 40 in equal shares. The value of the pension benefit is $17,838 and the present value of S's share is half of that, or $8,919. The pension plan administrator would pay $8,919 to the non-employee spouse or into the non-employee spouse's Registered Pension Plan or Registered Retirement Savings Plan. The employee spouse's entitlement would be reduced to reflect the payment of the non-employee spouse's share.

3.24 As noted in the example, the employee spouse's

entitlement would have to be reduced to reflect the fact that the non-employee spouse's share had been paid out. We think that the best way to deal with this reduction is to provide by regulation that the reduction should be made by the pension plan administrator upon the advice of an actuary.[19]

3.25 Money paid to the non-employee spouse in this way would be income for the purpose of taxation. In many cases the non-employee spouse would want to pay the money into a Registered Pension Plan or a Registered Retirement Savings Plan in order to defer paying income tax upon it, but we do not ourselves propose that there be a legal requirement that it be so paid. If there is an overriding pension policy against payment of the money out of the pension system which is of general application and which should be applied under the circumstances under discussion, regulations can be made accordingly.[20]

3.26 A valuation and division could be effected only by Court order. It could apply to a defined contribution plan as well as to a defined benefit plan.

Recommendation No. 8.

We recommend

(a) that the Court be given power to order a valuation and division of an employee spouse's pension benefit under which the employee spouse has a vested right to a deferred pension.

(b) that upon a valuation and division the amount for the non-employee spouse's benefit be charged against the employee spouse's pension benefit,

(c) that upon a benefit becoming payable to the employee spouse under the pension plan the pension

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19 Our reasons appear at Report for Discussion 2, pages 85-86.

20 See draft Act s. 18.9(4)(f).

plan administrator upon the advice of an actuary shall make an appropriate adjustment to employee spouse's pension benefit to reflect the amount paid out, and

(d) that regulations under the pension legislation provide for the making of the reduction.

[Proposed legislation, s. 18.2(1)(b), and s. 18.9(4)]

(b) Evidence

3.27 A valuation and division ought not to be made if it would prejudice the liquidity or solvency of a pension fund. Before the Court can make a finding of prejudice, it must be furnished with evidence about the liquidity or solvency of the fund.

3.28 We think that the pension plan administrator should in the first instance provide the evidence. He could do so when he provides the information upon which the valuation of the employee spouse's pension benefit would be based under our later proposals,[21] and he could do so on the same form. We regard it as essential that pension plan administrators be protected against being involved in matrimonial litigation except under extreme circumstances, and we therefore make two recommendations. One is that a pension plan administrator's statement be proof in the absence of evidence to the contrary that a valuation and division would prejudice the liquidity or the solvency of the pension fund. The second is that no finding contrary to such a statement by a pension plan administrator be made until the pension plan administrator has been given notice and an

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[21] See pages 54-55.

opportunity to appear.

3.29 We doubt that pension plan administrators will abuse the opportunity which these two recommendations would give to them. Even apart from the assurance given by their professional integrity and that of their advisers, it would be only rarely that a pension plan administrator would have an ulterior interest in doing so. We think that most would prefer to go through with a valuation and division in preference to the providing a separate pension or dividing the proceeds of a pension benefit, which under our proposals, would be the methods open to the Court if a pension plan administrator satisfied it that a valuation and division would affect the liquidity or solvency of a pension fund.

Recommendation No. 9.

We recommend that the certificate of a pension plan administrator that a valuation and division of an employee spouse's pension benefit would prejudice the liquidity or the solvency of the pension fund be proof of the truth of its contents in the absence of evidence to the contrary and that it not be overridden unless the pension plan administrator has been given notice of an application for that purpose and has had an opportunity to give evidence and be heard.

[Proposed legislation, s. 18.2(3) to 18.2(6)]

(3) Provision of a separate pension

3.30 The provision of a separate pension for the non-employee spouse bears some resemblance to the proposal for the division of the pension account which we tentatively rejected in Report for Discussion 2.[22] It was suggested to us during

[22] See Report for Discussion 2 page 43-44.

consultation by Dr. Larry Eberlein, who has been a trustee and pension board member for the Universities Academic Pension Plan, and it is the basis of the United States Retirement Equity Act of 1984, which came into force in 1985.

3.31 Under the provision of a separate pension, the non-employee spouse would, after a certain time, be treated in much the same way as a separate member of the pension plan. The non-employee spouse's separate pension would be based upon the non-employee spouse's life expectancy and life span and not upon the employee spouse's life expectancy and life span, and it would be governed by elections made under the pension plan by the non-employee spouse and not by the elections made by the employee spouse. We attach as Appendix B a specimen of an order which would provide a separate pension.

3.32 The provision of a separate pension for a non-employee spouse should not prejudice the interests of the pension fund or of those interested in it. The separate pension would therefore have to be of one of the kinds offered by the pension plan, and its actuarial value would have to be the same as the actuarial value of the non-employee spouse's fractional share of the pension which the employee spouse could, if the matrimonial property had not been divided, have claimed at the time the claim is made by the non-employee spouse. It follows that the separate pension could not start until the employee spouse reaches the first age at which he or she could retire and claim a pension under the plan. While it does not necessarily follow, we think that, for the protection of the pension plan and pension fund, the non-employee spouse's claim for a separate pension should

crystallize no later than the date upon which the employee spouse's pension starts.

3.33 For the sake of efficiency, we think that the matrimonial property order should deal with the commencement date of the separate pension. It could provide that the non-employee spouse's separate pension will commence on the first date on which the employee spouse could claim a pension. Alternatively, it could provide that the separate pension will commence on the earlier of a specified date and the date upon which the employee spouse's pension starts.

3.34 The steps under the provision of a separate pension would be as follows: (a) The Court would order that the pension plan administrator provide the non-employee spouse with a pension based upon a fraction of X/Y of the employee's pension benefit as it stood at the time of the division of the matrimonial property, "X" being the length of the part of the employee spouse's pensionable service during which he was married to the non-employee spouse, and "Y" being the employee spouse's total pensionable service up to the time of division; (b) at or after the date upon which the employee spouse reached an age at which he or she could claim a pension, the non-employee spouse would make a choice among the kinds of pensions available to employees under the pension plan; (c) the pension plan administrator, using the formulas which are used under the pension plan for similar computations for employee pensions, would determine the amount of that kind of pension for the non-employee spouse which would have a value equivalent to the appropriate share of the same kind of pension which the employee spouse could have taken at the same

time; and (d) the pension plan administrator and the pension fund would then pay the resulting pension to the non-employee spouse in the same way as a pension would be paid to an employee under the plan.

> Example: The matrimonial property of the employee spouse E and the non-employee spouse S referred to in Table 1 at page 72 is being divided between them at age 40 in equal shares. E has earned a normal pension of $7216 to start at age 65. If S claimed a normal pension when E turned 65, she would receive a pension of somewhat less than half of that, or $3233, because her life expectancy would be longer. If the pension plan would allow E to claim a pension at age 60, S could elect to claim her pension then, but it might be in a lesser amount because of the earlier start.

3.35 Under the provision of a separate pension the pension plan administrator would have to establish, maintain and administer two separate pension accounts, one for each spouse. It is not clear whether this would be worse or better from the point of view of the pension plan than would the division of proceeds by the pension plan administrator. The administrative burden of setting up the separate pension and administering two standard accounts might or might not be greater than the administrative burden of monitoring one non-standard account in the name of the employee spouse, which would be required under a division of proceeds by the pension plan administrator; and the provision of a separate pension would not involve the pension plan administrator in special negotiations with the Department of National Revenue about the deductions to be made for income tax purposes, while the division of proceeds might.

3.36 On balance, we think that the advantages for the spouses of the provision of a separate pension over the division of proceeds are so great that it should be preferred. We think that this is so even if the administrative burden which it would impose upon the pension plan administrator would be somewhat greater than the administrative burden which a division of proceeds would impose, but we are nevertheless encouraged by information given to us by our actuarial advisers to the effect that their colleagues in the United States are not aware that the United States Retirement Equity Act provisions, which are similar to those which we propose, have caused undue difficulties for pension plan administrators.

3.37 Provision of a separate pension for the non-employee spouse could be effected only by Court order. It could apply to defined contribution plans as well as to defined benefit plans, though it is unlikely to be needed for the former.

Recommendation No. 10.

We recommend:

(a) that the Court be given power to order the provision of a separate pension for the non-employee spouse where the employee spouse has a vested right to a deferred pension, and

(b) that the separate pension shall start on or after the date upon which the employee spouse could claim a pension under the pension plan, but not later than the date upon which the employee spouse starts to receive a pension under the pension plan.

[Proposed legislation, s. 18(1)(c)]

(4) Division of proceeds

(a) Description

3.38 We now turn to a discussion of the division of a pension benefit by division of proceeds. While we think it is a method of division which should be used only as a last resort - at least before the employee spouse's pension starts - we think that it should be available in cases where no other method of division is suitable. There are two forms of division of proceeds. One is division by the pension plan administrator. The second is division by the employee spouse. As these terms indicate, the only difference between them is that under one method it would be the pension plan administrator who would effect the division and under the other it is the employee spouse who effects it now and would continue to do so in the future. We will discuss them together.

3.39 Under a division of proceeds, the non-employee spouse is entitled to share in each dollar which is paid from the pension fund or under the pension plan to the employee spouse. This is different from the methods which we have previously discussed, all of which involve dividing between the spouses the current value of the pension benefits. We attach as Appendix C a draft of an order which would effect a division of proceeds which includes an optional provision which would require the pension plan administrator to effect the division.

3.40 The Court of Queen's Bench already has--and exercises--power to order that the proceeds of a pension benefit be divided by the employee spouse. In order to make that

direction effective, the Court makes the employee spouse a trustee for the non-employee spouse of the non-employee spouse's share of the pension and of all other benefits paid from the pension fund to the employee spouse. The Court usually prohibits the employee spouse from making an election under the pension plan without the approval of the non-employee spouse or of the Court. It may require the employee spouse to name the non-employee spouse as his beneficiary under the plan in case he dies.

3.41 Under a division of proceeds by the pension plan administrator, the Court would make the same order, except that it would direct the pension plan administrator to pay the non-employee spouse's share to the non-employee spouse and not to the employee spouse. The pension plan administrator would then be obliged to ensure that the direction is carried out.

> Example: The matrimonial property of the employee spouse E and the non-employee spouse S referred to in Table 1 at page 72 is being divided between them at age 40 in equal shares. The Court will order either E or the pension plan administrator (depending upon who is to make the division of proceeds) to pay S's share of the pension to S. If E takes a normal pension at age 65, S would receive one-half of E's annual pension, or $3608, during E's lifetime (assuming that E elected to receive the normal pension for his own lifetime). If E takes a different form of pension or retires early or late, S would receive one-half of whatever pension is in fact paid to E.

Recommendation No. 11.

We recommend that where an employee spouse has a vested right to a pension which is locked in, whether or not payment of the pension has started, the Court

(a) be given power to order a pension plan

administrator to pay to a non-employee spouse such portion of a payment of proceeds of the employee spouse's pension benefit as the Court may determine, and

(b) retain its existing power to order an employee spouse to pay to the non-employee spouse a share of the proceeds and to impose upon the employee spouse such trusts as are necessary to give effect to the order.

[Proposed legislation, s. 18.2(1)(d) and (e)]

(b) Elections

3.42 Under a division of proceeds, the interests of the employee spouse and of the non-employee spouse may come into conflict where a pension plan allows an employee spouse to choose among a number of different kinds of pension. One kind of pension which is available under the pension plan may be a pension for the employee spouse's life with or without a guaranteed term. Another may be a joint pension for the lives of the employee spouse and of the person who is the "spouse" of the employee spouse for the purposes of the pension plan, with or without a reduction upon the death of one of the two. One kind of pension may best suit the needs and the desires of one spouse, while another kind of pension may better suit the needs of the other. We think that the least objectionable solution of what is basically an insoluble problem of conflicting interests is for the law to provide that an employee spouse can make an election between kinds of pensions only with the agreement of the non-employee spouse or with the approval of the Court.[23]

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[23] Our reasons appear at Report for Discussion 2, pages 92-98.

3.43 As we pointed out in the Report for Discussion, a somewhat different problem arises if a pension plan allows the employee spouse to make a choice between a normal retirement date and an early or late retirement date. Again, the employee spouse's choice will affect the non-employee spouse's interests. However, we do not think that one former spouse, in order to advance the interests of the other, should be compelled either to keep a job which he or she wants to give up or to give up a job which he or she wants to keep. Nor do we think that one former spouse should be ordered to pay over to the other former spouse pension money which the first former spouse has not received, as some Courts have done in cases in which employee spouses have not taken pensions as soon as possible. We think that the right way to balance the interests of the spouses is to provide that the Court should not withhold its approval of an employee spouse's election among retirement dates unless it can be shown that the election is made in bad faith.

Recommendation No. 12.

We recommend that upon a division of proceeds an employee spouse should make elections under the pension plan only with the agreement of the non-employee spouse or the approval of the Court, but that if the election relates to the employee spouse's employment, the Court should not withhold its approval unless it is satisfied that the election is not made in good faith.

[Proposed legislation, s. 18.2(10), (11)]

(c) Division of death and disability benefits

3.44 If an employee spouse whose interest under a pension plan dies before receiving a pension, the pension plan will

usually provide a death benefit in the form of a lump sum or, sometimes, in the form of an annuity for a surviving spouse or child. If a pension benefit is being shared either by the provision of a separate pension for the non-employee spouse or by a division of proceeds, a question arises whether a death benefit should be shared.

3.45 We think that the proceeds of such a death benefit should be shared. Public pension legislation, however, provides that if an employee dies leaving a "spouse" as defined in the legislation, the death benefit is to be paid to the "spouse". A divorced non-employee spouse is not a "spouse" for this purpose, while a later spouse, or sometimes a later cohabiter, is. It is not clear from a reading of the legislation whether the money which is to go to a surviving "spouse" is available for sharing with the non-employee spouse. We think that the Court should be empowered to direct either the pension plan administrator or the spouse who receives the death benefit to pay to the non-employee spouse a share of the death benefit.[24] We do not think, however that an additional death benefit which arises because the employee spouse leaves a child or a later spouse should be shared. While the additional death benefit comes from the pension benefit which is being shared, we think that the law requires it for the social purpose of providing additional support for the child or later spouse and that the Matrimonial Property Act should not defeat that social purpose.

3.46 Another question arises if a pension plan provides a disability benefit for the employee spouse. Although the benefit

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[24] See Report for Discussion 2 page 99-100.

arises from the matrimonial property which is being divided, we think again, that it is provided for a different purpose, namely, the subsistence of the employee spouse, and that it should not be included in the property to be shared.

3.47 If a pension is divided by the provision of a separate pension for the non-employee spouse, we think that if a death benefit becomes payable before the non-employee spouse's separate pension begins, it should be shared, because it is paid in lieu of the whole pension which the pension plan would otherwise have provided, and because the death will deprive the non-employee spouse of the separate pension. However, once it commences, the non-employee spouse's separate pension represents the whole of the non-employee spouse's share of the pension benefit and there would no longer be any reason for the non-employee spouse to share in the employee spouse's death benefit.

3.48 For the same reason, that is, that the separate pension represents the whole of the non-employee spouse's share of the pension benefit, and also because the payment of a disability benefit will not affect the non-employee spouse's separate pension, we do not think that the non-employee spouse who is to receive a separate pension should share in the employee spouse's disability benefit.

3.49 In order to deal procedurally with the question of the death benefit, we think that the Court should have the power, either at the time of the division of the matrimonial power or later, to provide for the sharing of a death benefit.

Recommendation No. 13.

We recommend that a death benefit payable under a pension plan be shared under a division of proceeds, except for any additional amount payable because the employee spouse is survived by a child or by a later spouse; but that a disability benefit not be shared.

[Proposed legislation, s. 18.2(9).]

Recommendation No. 14.

We recommend that under the provison of a separate pension for the non-employee spouse, the Court be given power to order that a death benefit payable under the pension plan at any time before the separate pension is payable be shared, except for any additional amount payable because the employee spouse is survived by a child or by a later spouse; but that a disability benefit not be shared.

[Proposed legislation, s. 18.2(9).]

(d) Survivor's pension

3.50 Sometimes an employee will elect upon retirement to receive a pension which will last not only for his or her own life but also, at the same or a lesser amount, for the life of his or her spouse. Some public sector plans now require the employee to do so unless the other spouse otherwise agrees, and the proposed Employment Pension Plans Act would make a similar provision for private sector pension plans.

3.51 If a pension benefit is divided by division of proceeds, and if, upon a employee spouse's death, a surviving spouse receives a survivor's pension, a question will arise whether or not the proceeds of the survivor's pension are to be shared as part of the matrimonial property.

3.52 If the employee spouse and the non-employee spouse have gone through a division of matrimonial property but have not

been divorced, the survivor's pension may go to the non-employee spouse. We think that in such a case the survivor's pension is clearly part of the proceeds of the pension benefit and that the non-employee spouse should share it with the employee spouse's estate.

3.53 In the more common case, the survivor's pension will go to a later spouse or cohabiter, and the question is whether or not it should be shared with the former spouse. It might seem anomalous that the former spouse should share in a pension which would not be paid except for the fortuitous circumstance that the employee spouse has remarried or entered into a cohabitation arrangement by the later spouse or cohabiter. However, we think that the survivor's pension is nevertheless part of the proceeds of the pension benefit and that the former spouse should receive the appropriate share. This view is reinforced by the fact that it is likely that the pension received during the employee spouse's lifetime is likely to be less because of the survivorship aspect.

Recommendation No. 15.

We recommend that a pension paid to a spouse as the survivor of an employee spouse be considered part of the pension benefit for the purpose of the division of proceeds.

[Proposed legislation, s. 18.1(d)]

(e) Death of non-employee spouse

3.54 We think that an order for the division of the proceeds of a pension benefit should continue in force despite the death of the non-employee spouse. The purpose of the

Matrimonial Property Act is to divide property accumulated during marriage, including, in a proper case, a pension benefit. The non-employee spouse acquires a vested right to receive a share of the proceeds of the pension if and when it is paid, and, while the nature of the property is unusual, the death of the non-employee spouse should no more deprive him or her of the share of the proceeds than it would deprive him or her of, say, an interest in a house or other property. We think that this is implicit in what we have already said, but we will make a specific recommendation so that our views will be clear.

Recommendation No. 16

We recommend that an order for the division of proceeds of a pension benefit shall not be affected by the death of the non-employee spouse and that the proceeds shall be payable to the estate or to the beneficiaries of the non-employee spouse.

[Proposed legislation, s. 18.2(8)]

(5) Variation of remedy

3.55 A valuation and accounting is implemented by the transfer of property or money or by the assumption of obligations. A valuation and division would be implemented by the transfer of money. Each will be fully executed in the course of the matrimonial property settlement or litigation.

3.56 The provision of a separate pension would be different because its full execution would be deferred. So would a division of the proceeds of a pension benefit which is effected at a time before the commencement of the pension. In each of these cases a change in circumstances could make the order inappropriate.

3.57 One such change would be the transfer of the employee spouse's pension benefit from one pension plan to another, something which we do not think should be precluded by a matrimonial property order. Upon such a transfer either an order for the provision of a separate pension or an order for the division of proceeds would become inappropriate.

3.58 It would be possible to require the administrator of the first pension plan to retain a credit which would provide the non-employee spouse with a separate pension. We think that such a requirement would be unfair and burdensome. It would be possible to require the administrator of the second pension plan to provide a separate pension for the non-employee spouse, and it would be possible to provide for the division of proceeds of the second pension benefit instead of the first. However, the terms of the second pension plan may be quite different from the terms of the first--the employee spouse may improve his pension arrangements by the transfer, or he may accept inferior pension arrangements because of other benefits or extraneous circumstances--and we think that an atiempt to have the matrimonial property order follow the pension benefit into the new plan would be unfair to some or all of those involved and would be unworkable.

3.59 We think that there is a satisfactory alternative. The transfer of a pension benefit from one pension plan to another involves the valuation of the benefit and the transfer of money. Under those circumstances, a valuation and division could be effected. The first pension plan would not be prejudiced, because it would merely pay the same money to two persons instead

of one. The second pension plan would not be affected. The parties would be treated fairly.

3.60 There is another change in circumstances that would require a change in the method of division which should be applied. That is the death of the employee spouse after an order for the provision of a separate pension for the non-employee spouse is made and before the separate pension starts. The death of the employee spouse would mean that there would be no separate pension. It would, however, mean that there would be a death benefit. The appropriate action would be to convert the order for the provision of a separate pension into an order for the division of proceeds so that the non-employee spouse would share in the death benefit.

3.61 The efficient way of dealing with these possible changes in circumstances is to provide for them in the order for the provision of a separate pension or for the distribution of proceeds. However, the Court should have power to provide for them at any time before the situation has crystallized so as to make them inappropriate.

Recommendation No. 17

We recommend:

(a) that the Court have power, in a matrimonial property order or at any time before an employee transfers a pension benefit from one pension plan to another, to direct that valuation and division be substituted for the provision of a separate pension or for the division of proceeds,

(b) that the Court have power, in a matrimonial property order or at any time when any proceeds of a pension benefit have not been paid or remain in the hands of the employee spouse or his or her personal representatives and the payment of a separate pension has not started, to direct that

division of proceeds be substituted for the provision of a separate pension.

[Proposed legislation, s. 18.2(12), s. 18.2(1)(d) and (e)]

F. When each method of division is available

3.62 An employee's pension benefit under a pension plan goes through three stages which are relevant to our proposals. The first is the stage before vesting and locking in, after which time the employee spouse is customarily obliged to leave his vested rights in the pension plan. The second stage is between vesting and locking in and the start of the employee's retirement pension. The third stage is the time during which the retirement pension is paid.

3.63 Valuation and accounting can be effected at any stage, and, indeed, as will be seen later, is to be preferred at any stage.

3.64 We recommend that, as a general rule, valuation and accounting be the only method to be applied at the stage before the employee spouse's rights are vested. There is at that time no vested deferred pension to divide. All that the employee then has is a right to receive a sum of money if he terminates his employment; the sum may be only his own contributions plus earnings, or it may also include the employer's contributions plus earnings.

3.65 We recommend, however, that there be a qualification to the general rule. The Family Law Subsection of the Canadian

Bar Association pointed out to us that there can be a case in which an employee never acquires a vested right to a deferred pension or in which the vesting is deferred for an unreasonably long time. In such a case the employee spouse will in the later stages of his pensionable employment have a very substantial expectation that his pension will start within a short time, and it would not be fair to the non-employee spouse to value the pension benefit at the termination value. Alberta law now precludes the creation of a pension plan under which vesting can be delayed unduly, but there are some such plans in existence in Alberta and such plans might exist elsewhere. We therefore recommend that the Court have power in such a case to order a division of proceeds either by the pension plan administrator or by the employee spouse. This would apply either to the proceeds which the employee spouse receives upon termination of employment or to the proceeds of the pension if it is paid.

3.66 A valuation and division would be appropriate only at a time when the employee spouse's benefit is vested. It could not be used after the pension has commenced, because the commencement of the pension crystallizes the rights of the pension plan, the employee spouse, and (sometimes) of the provider of an annuity which is purchased for the employee spouse from the pension fund.

3.67 The provision of a separate pension for the non-employee spouse would also be appropriate only when the employee spouse's pension benefit is vested but the pension has not yet started. The considerations are similar to those which apply to a valuation and division.

3.68 We have recommended that in the rare case in which vesting is unduly delayed a division of proceeds might be made available before vesting and locking in. Generally speaking, it should not be used before vesting and locking in. It can be used at any time after vesting and locking in. It can even be used after the pension has commenced, as it does not affect the amount or duration of the pension. It does not matter whether the division of proceeds is to be effected by the pension plan administrator or by the employee spouse.

Recommendation No. 18.

We recommend that

(1) except as provided below, a pension benefit be divided before vesting and locking in by valuation and accounting.

(2) if a valuation and accounting would not be just and equitable because the vesting of the employee spouse's pension benefit is unduly delayed, the Court be given power to order that the pension benefit be divided by division of proceeds either by the pension plan administrator or by the employee spouse.

[Proposed legislation, s. 18.4]

Recommendation No. 19.

We recommend that if payments have started under a retirement annuity the pension benefit should be divided either by

(a) valuation and accounting, or

(b) division of proceeds either by the pension plan administrator or by the employee spouse.

[Proposed legislation, s. 18.2(1)]

G. Order of preference of methods of division

3.69 A majority of us think that the law should establish an order of preference among the methods of division, and that the order of preference should be in the order in which the methods are listed above.[25] Under that order of preference the first method on the list which is applicable to a given case would be applied unless that method would cause results which would not be just and equitable, in which case the next applicable method would apply unless it would cause results which would not be just and equitable, and so on until an appropriate method is reached.

3.70 The drawback to establishing an order of preference is that it would have a tendency to restrict the choices which are available to the spouses or to the Court in dividing the benefit of the pension rights. We think, however, that the advantages outweigh that drawback, and we will give our reasons for the order of preference during the following discussion of each method.

3.71 A valuation and accounting gives only rough justice because it adjusts rights in an individual case on the basis of statistical expectations which are unlikely to prove correct in an individual case. However, it effects an immediate settlement on terms which are fair to both spouses and which are impartial as between them. It does not leave the affairs of the spouses entangled in any way, or, as Chief Justice Nemetz of British

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[25] This is a departure from the tentative views which we expressed in Report for Discussion 2: See Report for Discussion 2, page 41.

Columbia recently put it, in "a friction-causing situation".[26] It does not expose them to the conflicts of interest inherent in the division of the proceeds of a pension benefit. It does not impose any cost upon the pension plan. It does not impose any administrative burden upon the pension plan other than the burden of providing a valuation under our later proposals, which is a minimal burden. These are reasons for providing for valuation and accounting and they are the reasons why we think that it should be the first preference.

3.72 As it is now practiced, valuation and accounting has a drawback. It is expensive, and it causes litigation to be lengthened. That is because of the method of valuation, which requires expert evidence and argument about each case. Our later proposals will provide a method of valuation which avoids that drawback.

3.73 There will be cases in which it would not be just and equitable for the Court to impose a valuation and accounting. The most common will be cases in which it would cause hardship to the employee spouse to get together enough money or property to pay for the non-employee spouse's share of the pension benefit. Under our proposals, the Court in such a case would be able to order the next method of division, which would be valuation and division.

3.74 Like valuation and accounting, valuation and division would separate the financial affairs of the spouses and achieve a final settlement there and then. It would affect the pension

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[26] Holenchuk v. Holenchuk (1986) 49 R.F.L. (2d) 17,21.

fund and would for that reason be less desirable than valuation and accounting. It would, however, impose less administrative burden upon the pension plan administrator than would the provision of a separate pension or the division of proceeds by the pension administrator. In the usual case it would impose no financial burden upon the pension fund, because pension plans are funded upon an actuarial basis and a valuation and division would merely require a pension fund to pay out an amount equal to the value of an existing obligation determined on actuarial principles.

3.75 Despite what we have said, there may be a case in which a valuation and division would not be just and equitable because it would prejudice either the liquidity or the solvency of a pension plan. A small pension plan which is solvent might not have enough liquid assets to pay out a non-employee spouse's share of a pension benefit. A small pension plan or a newly established pension plan might not yet have reached a fully funded position or might have suffered investment losses, so that taking out a non-employee spouse's share of a pension benefit might not leave enough assets in the pension fund to pay for the pensions of other employees who are or will become pensionable. If a valuation and division would not be just and equitable the Court would, under our proposals, be able to order the next method of division, which is division of a separate pension for the non-employee spouse.

3.76 The provision of a separate pension would not separate the affairs of the spouses immediately and would therefore be less desirable in ordinary circumstances from their point of view

than would a valuation and accounting or a valuation and division. It would involve the pension fund in a long term administrative arrangement and in providing an additional pension and would therefore be less desirable in ordinary circumstances from the pension plan's point of view than would either a valuation and accounting or a valuation and division.

3.77 However, the provision of a separate pension would separate the interests of the spouses when payment of the separate pension commences. The non-employee spouse would receive a pension which would be based upon circumstances which would be relevant to the non-employee spouse, and there would be no conflict of interest over elections about retirement dates and kinds of pensions. The superiority of a separate pension over a division of proceeds would be very great from the point of view of the spouses.

3.78 For a number of reasons, the division of proceeds of a pension benefit is an undesirable method of dividing a pension benefit if another method is available.

3.79 The first reason is that a pension for the non-employee spouse for a period which depends upon the actual lifetime of the employee spouse or of the employee spouse's later spouse depends on circumstances which may well have no significance for the non-employee spouse: the period during which the pension will be paid is, from the non-employee spouse's point of view, quite arbitrary, and it may be unsuited to the non-employee spouse's needs.

3.80 The second reason is that the interests of the employee spouse and the non-employee spouse may come into conflict over elections which the employee spouse is entitled under the pension plan to make about retirement and about terms of the pension. The employee spouse may want to postpone his or her retirement, either in order to keep earning a salary or merely to continue to have work to do, while the non-employee spouse may want to have a pension which starts earlier. An elderly employee spouse with no need to build up an estate may want to maximize the monthly pension payments by taking a pension for his or her own lifetime, while a younger former spouse might be better served by a pension with lower payments and a guaranteed term. The conflict of interest can be settled only by allowing one interest to prevail to the detriment of the other, or by a compromise which is detrimental to both. Under our earlier recommendations, the conflict would have to be settled by negotiation or by application to the Court, and we see no better means available. It is for these reasons that the division of proceeds should not be used unless, because of special circumstances, no other method of division is both practicable and just and equitable.

3.81 The start of the payment of the employee spouse's pension crystallizes the rights of the employee spouse and the pension plan. After that has happened, the pension benefit cannot be divided either by valuation and division or by the provision of a separate pension for the non-employee spouse. If, under those circumstances, for some reason, a valuation and accounting would not be just and equitable, a division of proceeds would be the only method of division which could be

used.

3.82 Of the two methods of dividing the proceeds, division by the pension plan administrator is very much in the interests of the spouses, especially the non-employee spouse. If the spouses are bitterly at odds, which some divorced spouses are, the bitterness will be exacerbated by a relationship in which one must write and deliver a cheque to the other every month. The non-employee spouse is dependent upon the employee spouse doing so: if the employee spouse does not, the non-employee spouse is put to the distress and to the cost and the delay of legal proceedings for collection, and, if the employee spouse has left the province, the effectiveness of the collection machinery is by no means beyond doubt.

3.83 These difficulties can be alleviated by agreement betweeen the spouses. They can arrange to have the money sent to a specified bank account along with an automatic deduction form in favour of the non-employee spouse, or to have it sent to a trustee who will make the division. The potential for difficulty still remains, however, and the non-employee spouse will have difficulty in monitoring the effect of changes in the amount of the pension if it is indexed to the cost of living.

3.84 The division of proceeds by the pension plan administrator imposes an administrative burden upon the pension plan administrator, who should be involved as little as possible in the affairs of two divorcing spouses. That is its drawback in comparison with the division of proceeds by the employee spouse. The administrator will have to decide what income tax deductions to make, and that may involve discussions with the Department of

National Revenue. The administrator will have to make special arrangements to ensure that two cheques will be written and sent out, and the administrator's staff will have to see that the two cheques are in fact written and sent out. The administrator will have to ensure that the effects of any changes in the monthly payments (caused, for example, by the indexing of a pension) are shared.

3.85 On balance, we think that pension plan administrators ought to be asked to bear the additional administrative burden where no other method of dividing a pension benefit is available which would be just and equitable as between the spouses. We are strengthened in this view by the expectation that if the whole scheme which we are recommending is adopted there will be comparatively few cases in which one of the other methods of division will not be followed and that it is only where the pension is already being paid that any significant number of orders for the division of proceeds will be made.

Recommendation No. 20

We recommend

(a) that the proposed legislation establish an order of preference among the proposed methods of division,

(b) that the order or preference be as follows: (1) valuation and accounting, (2) valuation and division, (3) provision of a separate pension for the non-employee spouse, (4) division of proceeds by the pension plan administrator, and (5) division of proceeds by the employee spouse, and

(c) that a method of division later in the order of preference be adopted only if all methods earlier in the preference are inapplicable or beyond the Court's jurisdiction or would cause a result which would not be just and equitable; provided that the order of preference need not be followed if following it would cause hardship.

[Proposed legislation,
s. 18.2(1), (7)]

CHAPTER 4. VALUATION OF VESTED PENSION BENEFITS

A. Need for valuation[27]

4.1 Under a valuation and accounting, an employee spouse pays a non-employee spouse for the non-employee spouse's share of the pension benefit. Under a valuation and division the pension plan administrator would do the same. Under either of these two methods of division it is necessary to establish the price to be paid to the non-employee spouse, which depends upon the value of the pension benefit.

4.2 If a separate pension is to be provided for a non-employee spouse, it would be necessary for the pension plan administrator to provide a pension having the same actuarial value as the appropriate fraction of a pension of the same kind which the employee spouse could have claimed. Again, some form of valuation is necessary. We will now turn to the problem of valuation.

B. Valuation before vesting

4.3 We have already said[28] that before the employee spouse's pension benefit vests, its value is whatever the employee spouse would receive if his or her membership in the plan were to be terminated. This would by law include the employee spouse's own contributions plus interest. It might under the pension plan include more: for example, the employer's contributions plus interest.

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27 See the discussion of valuation in Report for Discussion No. 2, pages 57-77.

28 See paragraph 3.64.

Recommendation No. 21.

We recommend that, before vesting, a pension benefit, subject to any necessary deduction for potential income tax liability, at the amount of any which the employee spouse would at the time of division of the matrimonial property be entitled to receive if his employment would be terminated at that time.

[Proposed legislation, s. 18.4]

C. Valuation after vesting

4.4 Under a defined contribution pension plan, the value of an employee's vested pension benefit is the amount of contributions made to the employee's account (whether by the employer or the employee) plus investment earnings credited to the account or minus investment losses.

Recommendation No. 22.

We recommend that under a defined contribution pension plan the value of an employee spouse's pension benefit be the amount of contributions and interest held for the employee spouse's account, including the vested portion of the employer's contributions and interest.

[Proposed legislation, s. 18.5]

4.5 Under a defined benefit plan, the valuation of a vested pension benefit is more complex, especially before the payment of the deferred pension begins. There are three points which should be noted.

4.6 First, what should be valued is the employee spouse's pension benefit as it exists at the time of the division of the matrimonial property. Second, the employee spouse's pension benefit should not be valued at an amount less than what the employee spouse would receive on termination of his employment.

Third, the employee spouse's pension should not be valued at less than the present value of the deferred money stream--that is to say, the deferred pension--which the employee spouse is entitled to receive if he lives until the retirement date provided for in the pension plan. The cumulative effect of these three points is that the pension benefit should be valued at the greater of the amount which the employee spouse would have received upon terminating his employment at the time of division and the amount equal to the current value of the deferred pension which the employee spouse had earned at the time of the division of matrimonial property.

4.7 There is, however, an ambiguity in this last statement. An employee is usually able to choose among different kinds of pensions and is often able to choose among different retirement dates. Sometimes the different pension which the employee can choose will have different actuarial values. How should a pension benefit under such a pension plan be valued?

4.8 There is a forceful argument for using the highest value for a valuation and accounting. After all, if the employee spouse can claim a pension having a particular present value, it is fair to say that he or she has an asset having that value for the purposes of a valuation and accounting. On the other hand, however, an employee spouse should not be required to make post-division career decisions for the benefit of the non-employee spouse, and there is no reason for the law to assume that he or she will do so or to treat him or her as having done so. There is also an argument for using the highest value for a valuation and division. If the pension plan is potentially

liable to perform an obligation having a given actuarial value, it does not seem unfair to require it to pay out a non-employee spouse's share on the basis of that actuarial value. There are, however, two countervailing arguments. One is that there is no certainty that the employee spouse will elect for the pension having the highest actuarial value and it is unfair to the employer and other employees to proceed on the assumption that he or she will do so. The other is that it is very likely that the provision of an option having a higher actuarial value than other options may well be intended to encourage employees to adopt that option--e.g., retire early--and in such a case it would be unfair to impose the higher burden upon the plan when the plan may or may not receive the benefit which the acceptance of the higher burden was intended to produce.

4.9 On balance, we think that the option which should be valued is the "normal" pension which the employee spouse would be entitled to receive under the plan upon his or her "normal" retirement date. It is true that the employee spouse, when the time comes, may choose another pension or another retirement date. However, the "normal" provisions are those which the pension plan has chosen as the benchmarks, and, in the absence of any sure way of foretelling the future, and in the absence of an election by the employee spouse to take a more valuable pension or retirement date, we think that justice would best be served by choosing them as the benchmarks for the valuation of a pension benefit for the purposes of division of matrimonial property. Of course, if the employee spouse has already made an election, the pension which he has elected to take should be the one to be valued.

Recommendation No. 23.

We recommend that under a defined benefit plan where the employee spouse has a vested right to a deferred pension the pension benefit be valued at the greater of

(a) the amount that the employee spouse would be entitled to if his participation in the pension plan had terminated immediately before the time of the valuation, and

(b) the present value of the normal pension which the pension plan would provide on the employee spouse's normal retirement date under the plan, or of the pension which an employee spouse has elected to take.

[Proposed legislation, s. 18.5]

4.10 In valuing a deferred pension under a defined benefit plan, the first step is to compute the annual amount of the deferred pension by applying the formula prescribed by the pension plan to the facts of the employee spouse's service. Table 1 at page 72 gives examples. This step does not cause any difficulty.

4.11 The second step is to estimate the value which the pension will have upon the date upon which it is scheduled to commence. This depends upon the life expectancy upon an actuarial basis which the employee spouse will have at that time and upon the cost of annuities at that time. Neither will be known at the time of valuation, and reasonable assumptions must therefore be made.

4.12 The third step is to discount to the present date the value determined under the last preceding paragraph. The discount rate should not necessarily be the current market interest rate, the fluctuations of which make it an inappropriate measure. Rather, it should be a rate based upon an estimate of

future interest rates based upon long experience. Reasonable assumptions must be made here as well.

4.13 We propose that the assumptions needed for the second and third steps be prescribed annually by regulations. The regulations would prescribe interest and discount rates and give tables of values. They could be made on the basis of advice from an advisory committee which should include the officials who advise the government about pension matters and persons expert in the disciplines involved in valuing deferred annuities. This would avoid contested valuations in individual cases, with the delay and cost involved, and we think that the valuations so arrived at would be as fair to both employee spouses and non-employee spouses as would valuations arrived at by the Court on the basis of conflicting views of experts.

Recommendation No. 24.

We recommend:

(1) that regulations be promulgated under the Pension Benefits Act or its successor Act and under the public sector pension statutes:

(a) adopting annually interest and discount rates to be used in valuing vested deferred annuities under defined benefit pension plans and providing tables of values for such deferred annuities.

(b) requiring a pension plan administrator, upon requisition by a spouse involved in negotiating or litigating the division of matrimonial property upon marriage breakdown, or upon an order of the Court, to provide in prescribed form the information necessary to determine the present value of the employee's normal retirement annuity.

(2) that the regulations be promulgated by the responsible Ministers after receiving the advice of an advisory committee which should include the officials charged with the administration of the pension legislation and persons expert in the disciplines involved in the valuation of deferred annuities.

[Proposed legislation, s. 18.9]

4.14 Some pension benefits are already "portable" under some circumstances, that is, they can be moved from one pension plan to another. If all pension benefits, or all of a class of pension benefits, are made portable, many of the difficulties of valuation which we have mentioned will disappear. A system of portability would allow an employee to transfer to another pension vehicle an amount equal to the value of his pension benefit. A system of valuation would have to be provided for it. The same system of valuation could as a practical matter be applied to valuation for the purposes of the division of matrimonial property. Furthermore, the same system of valuation should apply as a matter of principle upon the division because it would determine as a matter of law what the employee spouse would be entitled to if he rendered no further service to the employer.

Recommendation No. 25.

We recommend that, if the law is changed to provide that upon termination of employment an employee is by law entitled to have an amount of money representing his pension benefit under a defined benefit pension plan transferred to another pension vehicle, an employee spouse's pension benefit shall be valued at that amount for the purposes of division upon marriage breakdown.

4.15 The valuation of a pension which is already being paid is simpler than the valuation of a deferred vested pension, but it is still complex. The value will be the present value of an income stream for the actuarial life expectancy of the person or persons for whose life the pension is payable, subject to the effect of any guaranteed period of payment.

Recommendation No. 26

We recommend that if an employee spouse is already receiving a pension under a pension plan at the time of the division of matrimonial property, the pension benefit be the present value of the pension.

[Proposed legislation, s. 18.5(2)]

D. Mandatory use of valuation

(1) Valuation and division

4.16 Innocent bystanders must be protected against being prejudiced by lawsuits between spouses. Therefore, if there is to be a valuation and division, it must be on the basis of a valuation produced under a standardized procedure which will not involve pension plans and their administrators in litigation. Our proposals would provide such a procedure. If the valuation were to be made by the Court in each case, pension plan administrators would be obliged to come to Court and to provide evidence, which would be an intolerable imposition, and pension funds would be exposed, through no fault of their own and for no purpose of their own, to the uncertain results of litigation.

4.17 Our proposals would provide a safety valve in case a valuation under the prescribed procedure gives an unjust result. It would be in the Court's discretion not to order a valuation and division if valuation and division would not be just and equitable. We would not expect the discretion to be used frequently, but it would be there.

Recommendation No. 27.

We recommend that a valuation made under Recommendation

23, Recommendation 24 or under Recommendation 25 be binding for the purposes of a valuation and division.

[Proposed legislation, s. 18.5(1)]

(2) For valuation and accounting

4.18 For different reasons, we think that a valuation made under the procedures which we propose should be binding upon the Court under a valuation and accounting as well. We have two reasons, which are cumulative. First, the procedure would be fair and it would produce fair valuations. Second, the procedure would avoid the costs and delays interest in a system of individual valuations for individual lawsuits.

Recommendation No. 28.

We recommend that a valuation made under Recommendations 23 and 24 or under Recommendation 25 or Recommendation 26 be binding for the purposes of a valuation and accounting.

[Proposed legislation, s. 18.4, 18.5]

E. Valuation for provision of a separate pension

4.19 A separate pension for a non-employee spouse would have to have the same actuarial value as the appropriate fraction of the employee spouse's pension benefit. Determining the amount of a separate pension would therefore involve valuing both the employee spouse's pension benefit and the separate pension to be provided for the non-employee spouse. This is the same process as that which a pension plan administrator goes through when an employee elects to take a pension other than the standard pension

provided under the plan. Because the process is the same, we think that these valuations can be left to the usual processes under pension plans.

Recommendation No. 29.

We recommend that in determining the amount of a separate pension for a non-employee spouse a pension plan administrator value the pension which the employee spouse could claim and the pension to be provided for the non-employee spouse in the same manner as similar valuations would be made under the pension plan for the purpose of determining the amount of alternate optional forms of pension for employees and their spouses.

F. Valuation where part of benefit is exempt

4.20 The Matrimonial Property Act exempts from division as matrimonial property the value of property which either spouse owned before the marriage. It goes on to provide that any increase which takes place during the marriage in the market value of the exempted property is divisible matrimonial property, though the presumption that it should be distributed equally does not apply. Similar principles should apply to pension benefits. They should, however, be applied somewhat differently. For one thing, the reference in the Matrimonial Property Act to the "market value" of exempted property is inappropriate because a pension benefit is not saleable and does not have a market value. For another, the strict wording of the Act would require the Court go back to the time of the marriage and to value what the employee spouse then had and then to compare that value with the current value of the benefit. This procedure would be difficult, costly and time-consuming, and it would often be inaccurate.

4.21. What the Court has done is in practice to pro-rate the current value of pension benefit over the whole of the employee spouse's pensionable service and attribute to the married years their pro-rated share of the total. If, for example, the employee spouse joined the pension plan at age 25, married at age 30, and divorced at age 35 after ten years of pensionable service, the Court would attribute half of the current pension benefits to the married years.

4.22 Pension benefits tend to grow more rapidly in later years of pensionable service. Pro-rating the pension benefit over the whole of employee spouse's pensionable service therefore tends to over-state the amount earned before marriage and to under-state the amount earned during marriage. It tends to favour the employee spouse. However, it is a sensible solution and the one which we think should be applied. We think that the Act should be changed so as to give a firm legal foundation to it.

4.23 The principle is the same whether a pension benefit is being valued for the purposes of a valuation and accounting or valuation and division, or whether a fractional value is being ascertained for the purpose of the provision of a separate pension or the division of proceeds.

Recommendation No. 30.

We recommend that the Matrimonial Property Act be amended to confirm that an employee spouse's pension benefit which began to accrue before the marriage can be pro-rated over the pre-marriage and marriage years.

[Proposed legislation, s. 18.7]

G. Contingencies

4.24 There are two contingencies which might deprive an employee spouse of his pension. One is that he may die before receiving it. The second is that the pension fund may not have enough assets to pay it.

4.25 Considerations of abstract justice might suggest that the value of the pension benefit should be discounted in order to allow for these contingencies. Our actuarial advice, however, is that the likelihood of either contingency occurring in an individual case is small. We think that any increase in abstract justice which would result from allowing for either contingency would be delusive and would be outweighed in importance by the additional complexities and cost involved in allowing for them. There is also an additional partial answer to the argument that a pension plan may be prejudiced by having to pay out the non-employee spouse's share without regard for the possibility of the employee spouse's death. It is that in that event the pension plan would have had to pay out the death benefit under the pension plan.

4.26 We do not think that an allowance should be made for either contingency upon a valuation and division or, as a general rule, upon a valuation and accounting. However, If there are special circumstances which would make the result unfair - e.g., if the employee spouse is at death's door, or there is strong reason to doubt the solvency of the pension plan - the Court should have power to make an allowance for either circumstance upon a valuation and accounting.

Recommendation No. 31.

We recommend that no allowance shall be made upon a valuation and division for the possibility that the employee spouse will not live until the commencement of a pension or for the possibility that the pension fund may not be sufficient to pay all pensions charged upon it.

[Proposed legislation, s. 18.8]

Recommendation No. 32.

We recommend that upon a valuation and accounting no allowance shall be made for the possibilities mentioned in Recommendation No. 31 unless a valuation without such an allowance would not be just and equitable.

[Proposed legislation, s. 18.8]

H. Allowance for income tax liability

4.27 An employee spouse's pension benefit is subject to a potential income tax liability because any money which he receives and does not put into another pension vehicle will be taxable income in his hands. This applies to a termination benefit and it applies to the employee spouse's retirement pension itself. On the other hand, any money which the employee spouse pays the non-employee spouse for the non-employee spouse's share of the pension benefit under a valuation and accounting is not subject to any liability for income tax. It would not be fair to require the employee spouse to buy for full value an asset which is subject to a tax liability. The Court should therefore have power to take any potential tax liability into consideration and to make a deduction for it.

4.28 However, it is only under a valuation and accounting that an allowance for income tax needs to be made. Under the other methods of division the tax liability will fall upon the employee spouse and the non-employee spouse in accordance with the amount of proceeds which each receives from the pension fund. This would be true even if the proceeds of a valuation and division were to be taxable in the hands of a non-employee spouse.[29]

Recommendation No. 33.

We tentatively recommend that upon a valuation and accounting a deduction may be made for the potential effect of income tax, if any.

[Proposed legislation, s. 18.2(1)(a), s. 18.4]

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[29] See chapter 5 of this report for a discussion of this possibility.

CHAPTER 5. INCOME TAX CONSEQUENCES OF VALUATION AND DIVISION

5.1 Under a valuation and division, money would be paid out of a registered pension plan to the non-employee spouse. If that money would necessarily form part of the taxable income of either spouse, that would be a serious drawback to the valuation and division procedure. Since the adoption of valuation and division would be an innovation in Canada, there is no history of legislative interpretation or of departmental practices which will help to determine whether or not the proceeds would be taxable.

5.2 Section 56(1)(a)(i) of the Income Tax Act includes in a taxpayer's income "a superannuation or pension benefit" received by the taxpayer. The definition of "superannuation or pension benefit" in section 248 includes "any amount received out of or under a superannuation or pension fund or plan" and includes "any payment made to a beneficiary under the fund or plan". It appears that these provisions would bring into a non-employee spouse's income the proceeds of a valuation and division paid to the non-employee spouse. However, section 60(j) of the Act, as it now stands, allows a taxpayer to deduct from income an amount which is paid into a registered pension plan or a registered retirement savings plan and which is not greater than an amount "received out of or under a registered pension fund or plan" in the taxation year. This section appears to allow a non-employee spouse to roll over into a new pension vehicle the money which would be received on a valuation and division. If it does, the income tax liability would continue to be deferred in the hands of the non-employee spouse in the same way as if it had remained

in the employee spouse's pension plan.

5.3 Before we issued Report for Discussion 2, we were advised that the interpretation of the provisions of the Income Tax Act which we have given above was not beyond doubt. Since then we have received a letter from the Department of National Revenue which confirms that a non-employee spouse could continue to defer income tax by rolling the proceeds of a valuation and division over into another registered pension vehicle (though, in their view, this would be so only if the original pension plan permits the making of such payments to the spouses or members). Such a letter is not legally binding upon the Department and therefore does not provide legal bedrock. However, the wording of the Income Tax Act and the availability of a departmental assurance may be sufficient to persuade the professional advisers of a non-employee spouse that the risk of income tax being accelerated by a valuation and division is not significant.

5.4 Our recommendations would not preclude the non-employee spouse from making some use of the proceeds of a valuation and division other than putting them into another pension vehicle (though provincial government policy may do so). In such a case, the Department of National Revenue would probably treat the proceeds as taxable income in the hands of the non-employee spouse. We see nothing wrong with this.

5.5 All pension plans should be amended to provide for payment to a non-employee spouse, or at least to the non-employee spouse's registered pension plan or registered retirement savings plan, of an amount equal to the value of the non-employee spouse's share.

Recommendation No. 34

We recommend that the proposed legislation provide for the amendment of all pension plans to provide for the division of pension benefits in accordance with the Matrimonial Property Act.

[Proposed legislation, s. 3(1)]

5.6 Up to this point we have discussed the income tax situation upon the basis of the Income Tax Act as it now stands. There is, however, a disturbing suggestion that it will be changed in a way which would be prejudicial to the division of a pension benefit by valuation and division.

5.7 The federal budget proposals of May, 1985, include a proposal that section 60(j) of the Income Tax Act will disappear in 1991. If that were to happen and nothing more were to be done, the proceeds of a valuation and division would be taxable in the hands of a non-employee spouse in the year in which they were received. By 1991, a non-employee spouse with a sufficient income would be entitled to make a substantially greater contribution to a registered retirement savings plan than is now possible, and to the extent that the proceeds of a valuation and division could be included in such a contribution, the non-employee spouse would be as well off as under a rollover under section 60(j). It is, however, unlikely that most non-employee spouses will have sufficient income to support a maximum contribution to a registered retirement savings plan, and even the maximum contribution might not be enough to give adequate protection against the acceleration of income tax on the pension proceeds.

5.8 If a non-employee spouse were to be required to include in his or her current taxable income the proceeds of a valuation and division, this form of division of pension benefits would be much less attractive. Apart from an occasional case in which ready money would be of enough importance to a non-employee spouse to make the tax liability acceptable, valuation and division would probably be used only where the non-employee spouse's share of the pension benefit is of small value. Such a development would largely defeat the purpose of making valuation and division available.

5.9 Nevertheless, we think that provincial legislation should provide for valuation and division. Even if it is widely used only for five years we think that it should be made available. Further, we think that the fact of its availability will provide a foundation for procuring income tax relief for the future.

5.10 The policy of the federal government seems to be to encourage the division of pension benefits upon marriage breakdown. This is apparent from the quite rigid provisions for the splitting of Canada Pension Plan benefits between spouses, and it is confirmed by our conversations with federal officials. If provincial legislation were to provide for valuation and division, and if valuation and division were to prove to satisfy a social need (as we think it would), a good case could be made for some form of relief under federal legislation. Section 60(j) could be left in effect for the division of pension benefits between spouses, or some specific provision could be included in federal legislation. We think that the subject is itself one of

sufficient importance to be included in negotiations between Alberta and the federal government, and we recommend that the point be pursued. Furthermore, portability of pensions seems likely to be achieved, and in the absence of section 60(j) the same tax problem would apply to an employee who moves his pension benefit from one person to another, so that it seems likely that there will be negotiations to protect the portability of pensions in which negotiations to protect valuation and division could be included.

Recommendation No. 35

We recommend that the government of Alberta pursue with the federal government discussions leading to the continuation of tax deferral for the proceeds of a valuation and division in the event that section 60(j) of the Income Tax Act is repealed or made inapplicable to them.

CHAPTER 6. RELATIONSHIP BETWEEN DIVISION OF PENSION BENEFITS AND MATRIMONIAL SUPPORT

6.1 In this report we deal with pension benefits as matrimonial property. We do not deal with them as sources of matrimonial support. We will now give our reasons for this course of action.

6.2 Both property rights and support obligations are, of course, elements of the economic relationship between spouses. Property rights, however, are based upon the past -- the economic gains which a couple have made during their marriage -- and upon the legal consequences of those historical facts. A matrimonial support award is based upon the present and future needs and means of each spouse. The considerations are quite different.

6.3 It is theoretically possible to deal with property and support as one subject. The English, for example, do so: an English court makes an order for "financial provision" which has both property and support aspects. Probably this could not be done under Canadian divorce law, because the division of matrimonial property is under provincial legislative jurisdiction while support on divorce is governed by federal legislation. But even if it were possible to deal with property and support together, we think that it is better to deal with them as separate subjects, though in one hearing. First, the respective rights of the spouses should be determined, and the matrimonial property divided between them. Second, in the light of the means and needs of each spouse following the division of the matrimonial property, it should be determined whether their respective needs and means are such that one should provide

financial support for the other.

6.4 This was the view which we expressed at page 7 of our Report 18, Matrimonial Property, of August 1975, and we think it fair to say that it is the view which is embodied in the Matrimonial Property Act which was enacted after our report was issued. It is the view which prevails in Alberta courts.

6.5 After the matrimonial property has been divided, the Court can address the question of support. In determining the needs of the economically weaker spouse and the means of the other spouse, the Court will take into account their respective property positions after the division. If the economically weaker spouse has received a substantial amount of property, his or her needs will have been reduced, and the means of the other spouse will also have been reduced. The division of the matrimonial property will thus tend to keep the support award down.

6.6 It follows that, in deciding whether to award matrimonial support, the Court will take into consideration the situation resulting from the division of a pension benefit. How it will do so will depend upon the form which the division takes. If the non-employee spouse receives disposable cash or income, the Court will take it into consideration like any other disposable cash or income with the non-employee spouse has. If the non-employee spouse receives proceeds from the pension benefit later the Court will either take them into consideration later, or design its current award to take them into account when they are received. This appears to us to be workable and suitable.

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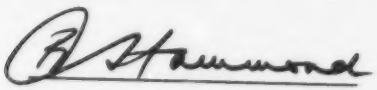

DIRECTOR

June, 1986

TABLE 1

EXAMPLE OF EFFECTS OF DIFFERENT METHODS OF DIVISION OF PENSION BENEFITS

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Age	E's Yearly Salary	E's Accum. Contribs.	(3) plus interest	S's share of (4)	E's Earned Pension	S's share of (6)	Current Value of (7)	S's Separate Pension
30	24,333	5,416	6,079	3,039	1,625	812	1,122	728
35	29,605	12,006	15,530	7,765	3,954	1,977	3,652	1,772
40	36,019	20,024	29,781	14,890	7,216	3,608	8,919	3,233
45	43,822	29,778	50,801	25,400	11,705	5,853	19,362	5,245
50	53,317	41,646	81,302	40,651	17,802	8,901	39,406	7,976
55	64,868	56,085	125,005	62,502	25,990	12,995	76,991	11,645
60	78,922	73,652	187,000	93,500	36,891	18,446	146,245	16,529
64	92,327	90,409	254,357	127,178	48,090	24,045	240,676	21,547

ASSUMPTIONS UNDERLYING TABLE 1

1. E and S were married on the 25th birthday of both, E is male.

2. E joined the pension plan at age 25 and will remain under it until he retires at age 65.

3. E's earnings started at $20,000 and will have increased at 4% per year from then until retirement.

4. The pension plan provides a normal pension for E's life of 1 1/2% of his average salary for the last 5 years of service for each year of service.

5. E's contributions to the pension plan are 5% of his salary per year.

6. Investments earn 6% per year.

7. 1983 GAM mortality rates are used. S's life expectancy at age 65 will be 4.6 years more than E.s.

EXPLANATION OF TABLE 1

1. The purpose of this table is to illustrate by one specific example the differences in effect of each of the methods of division of pension benefits on marriage breakdown described in this report. It is not intended to give any indication of amounts under any circumstances other than the precise circumstances outlined above.

2. Each line of the table shows what would happen if matrimonial property were divided (which usually implies a divorce) when the spouses reach a different age.

3. Col. 3 is the total to date of E's yearly contributions of 5% of his salary. Col. 4 is the contributions plus the earnings attributed to them at 6% per year.

4. Col. 6 is the pension which E would receive for his life at age 65 if he terminated his employment at the age shown in col. 1 and his pension benefit remained in the pension plan. Col. 7 is one half of that.

5. Under valuation and accounting or valuation and division S would receive the higher of col. 5 and col. 8. (If E and S divorce at age 40 she would receive $14,890.) However, under valuation and accounting the amount might be reduced to allow for E's deferred income tax liability.

6. Under division of proceeds S would, if E retires at the age of 65 and takes the normal pension offered by the pension plan, be entitled to receive a share of E's pension as set out in col. 7. This is based upon E's pension benefit as it

stands at the time of the division of matrimonial property, so that if the division took place when E and S were 40 years of age, S would receive $3608 per year from E's normal pension of $7216. If E retires at a different age or elects to take a kind of pension other than the normal pension, the annual amount which S would receive, or the commencement date of the pension, or both, would be different.

7. Under the provision of a separate pension S would, when E reaches age 65, be entitled to receive a pension for S's lifetime of the amount in col. 9. (If E and S divorce at age 40 the amount would be $3233.) The reason why this is less than the amount shown in col. 7 is that S's life expectancy is longer than E's; a pension for S's life in the amount shown in col. 9 would have the same actuarial value as a pension for E's life in the amount shown in col. 7.

PART III: LIST OF RECOMMENDATIONS

Recommendation No. 1.

We recommend:

(1) that upon marriage breakdown the economic gain represented by the acquisition or an increase in value during marriage of a pension benefit should be divisible between the spouses under and in accordance with the principles of the Matrimonial Property Act and in particular the principle of just and equitable division.

(2) that in giving effect to those principles the following considerations should be borne in mind:

(a) that it is desirable to avoid or to minimize future financial and business relationships between the spouses.

(b) that it is desirable to facilitate and encourage settlements.

(c) that it is desirable to minimize the financial and emotional costs of the division.

(d) that income tax consequences of the division of matrimonial property should be taken into account, and that it is desirable to avoid attracting income tax which would not otherwise be payable.

(3) that the rights of third parties should not be prejudiced by the division of a pension benefit between the spouses.

(4) that the division of a pension benefit should not contravene the policy behind pension legislation.

[Page 8]

Recommendation No. 2.

We recommend that in dividing a pension benefit no account be taken of an actual or prospective change in an employee spouse's salary after the division unless at the time of the division the employee spouse has a right to receive the increase in salary or the employer has a right to reduce the salary.

[Page 13]

[Proposed legislation, s. 18.4]

Recommendation No. 3.

We recommend that in dividing a pension benefit no account be taken of an actual or prospective improvement in the pension plan after the division unless at the time of the division the employee spouse has a right to have the improvement made.

[Page 14]

[Proposed legislation, s. 18.4]

Recommendation No. 4.

We recommend that the legislation proposed in this report apply to a pension benefit under any of the following:

(a) pension plans established by or under Alberta legislation, and in particular a pension plan established under The Alberta Government Telephones Act, The Local Authorities Pension Plan Act, The Members of the Legislative Assembly Pension Plan Act, The Public Service Management Pension Plan Act, The Public Service Pension Plan Act, The Special Forces Pension Plan Act, The Teachers' Retirement Fund Act, and the Universities Academic Pension Plan Act.

(b) pension plans which are or ought to be registered under the Pension Benefits Act (Alberta).

(c) pension plans which are covered by reciprocal intergovernmental agreements under which the plans, insofar as they cover Alberta employees, are to be administered in accordance with Alberta law.

(d) pension plans which are established or registered by or under statutes which recognize Alberta law or Alberta court orders.

[Page 15]

[Proposed legislation, s. 18.1(e)]

Recommendation No. 5.

We recommend that, in order to give effect to the proposals made in this report,

(a) the Matrimonial Property Act be amended along the general lines indicated by the proposed legislation attached to this report, and

(b) that the amending legislation be given overriding effect with respect to pension legislation.

[Page 16]

[Proposed legislation, s. 18.1(2), s. 18.2(2)]

Recommendation No. 6.

We recommend that the following methods of division of a pension benefit be used:

(1) a valuation and accounting, under which the employee spouse would retain the pension benefit and compensate the non-employee spouse for the appropriate share of the pension benefit.

(2) a valuation and division, under which the pension plan administrator would

(a) pay for the benefit of the non-employee spouse the present value of the share in the pension benefit which the non-employee spouse is entitled to receive, and

(b) reduce the employee spouse's pension benefit to reflect the payment.

(3) the provision of a separate pension for the non-employee spouse, under which the pension plan administrator would

(a) pay to the non-employee spouse, on or after the earliest date at which the employee spouse could claim a pension and before the employee spouse's pension starts, a pension of a kind which is provided for under the pension plan which would have an actuarial value that is equal to non-employee spouse's share of the pension that the participant spouse could have claimed on that date, and

(b) reduce the employee spouse's pension benefit to reflect the payment.

(4) a division of the proceeds of the pension benefit by the pension plan administrator.

(5) a division of the proceeds of the pension benefit by the employee spouse.

[Page 17]

[Proposed legislation, s. 18.2((1)]

Recommendation No. 7.

We recommend that the Court continue to have power to order a valuation and accounting.

[Page 19]

[Proposed legislation, s. 18.2(1)(a)]

Recommendation No. 8.

We recommend

(a) that the Court be given power to order a valuation and division of an employee spouse's pension benefit under which the employee spouse has a vested right to a deferred pension.

(b) that upon a valuation and division the amount for the non-employee spouse's benefit be charged against the employee spouse's pension benefit,

(c) that upon a benefit becoming payable to the employee spouse under the pension plan the pension plan administrator upon the advice of an actuary shall make an appropriate adjustment to the amount paid out, and

(d) that regulations under the pension legislation provide for the making of the reduction in this way.

[Page 21]

[Proposed legislation, s. 18.2((1)(b), and s. 18.9(4)]

Recommendation No. 9.

We recommend that the certificate of a pension plan administrator that a valuation and division of an employee spouse's pension benefit would prejudice the liquidity or the solvency of the pension fund be proof of the truth of its contents in the absence of evidence to the contrary and that it not be overridden unless

the pension plan administrator has been given notice of an application for that purpose and has had an opportunity to give evidence and be heard.

[Page 23]

[Proposed legislation, s. 18.2(3) to 18.2(6)]

Recommendation No. 10.

We recommend:

(a) that the Court be given power to order the provision of a separate pension for the non-employee spouse where the employee spouse has a vested right to a deferred pension.

(b) that the separate pension shall start on or after the date upon which the employee spouse could claim a pension under the pension plan, but not later than the date upon which the employee spouse starts to receive a pension under the pension plan.

[Page 27]

[Proposed legislation, s. 18.1(1)(c)]

Recommendation No. 11.

We recommend that where an employee spouse has a vested right to a pensionwhich is locked in, whether or not payment of the pension has started, the Court

(a) be given power to order a pension plan administrator to pay to a non-employee spouse such portion of a payment of proceeds of the employee spouse's pension benefit as the Court may determine, and

(b) retain its existing power to order an employee spouse to pay to the non-employee spouse a share of the proceeds and to impose upon the employee spouse such trusts as are necessary to give effect to the order.

[Page 29]

[Proposed legislation, s. 18.2(1)(d) and (e)]

Recommendation No. 12.

We recommend that upon a division of proceeds an employee spouse should make elections under the pension plan only with the agreement of the non-employee spouse or the approval of the Court, but that if the election relates to the employee spouse's employment, the Court should not withhold its approval unless it is satisfied that the election is not made in good faith.

[Page 31]

[Proposed legislation, s. 18.2(10),(11)]

Recommendation No. 13.

We recommend that a death benefit payable under a pension plan be shared under a division of proceeds, except for any additional amount payable because the employee spouse is survived by a child or by a later spouse; but that a disability benefit not be shared.

[Page 34]

[Proposed legislation, s. 18.2(4), 18.3]

Recommendation No. 14.

We recommend that under the provision of a separate pension for the non-employee spouse, the Court be given power to order that a death benefit payable under the pension plan at any time before the separate pension is payable be shared, except for any additional amount payable because the employee spouse is survived by a child or by a later spouse; but that a disability benefit not be shared.

[Page 34]

[Proposed legislation, s. 18.2(9)]

Recommendation No. 15.

We recommend that a pension paid to a spouse as the survivor of an employee spouse be considered part of the pension benefit for the purpose of the division of proceeds.

[Page 35]

[Proposed legislation,
s. 18.1(d)]

Recommendation No. 16

We recommend that an order for the division of proceeds of a pension benefit shall not be affected by the death of the non-employee spouse and that the proceeds shall be payable to the estate or to the beneficiaries of the non-employee spouse.

[Page 36]

[Proposed legislation,
s. 18.2(8)]

Recommendation No. 17.

We recommend:

(a) that the Court have power, in a matrimonial property order or at any time before an employee transfers a pension benefit from one pension plan to another, to direct that valuation and division be substituted for the provision of a separate pension or for the division of proceeds, and

(b) that the Court have power, in a matrimonial property order or at any time when any proceeds of a pension benefit have not been paid or remain in the hands of the employee spouse or his or her personal representatives and the payment of a separate pension has not started, to direct that division of proceeds be substituted for the provision of a separate pension.

[Page 38]

[Proposed legislation,
s. 18.2(12), s. 18.2(1)(d)
and(e)]

Recommendation No. 18.

We recommend that

(1) except as provided below, a pension benefit be divided before vesting and locking in by valuation and accounting.

(2) if a valuation and accounting would not be just and equitable because the vesting of the employee spouse's pension benefit is unduly delayed, the Court be given power to order that the pension benefit be divided by division of proceeds either by the pension plan administrator or by the employee spouse.

[Page 41]

[Proposed legislation, s. 18.4]

Recommendation No. 19.

We recommend that if payments have started under a retirement annuity the pension benefit should be divided either by

(a) valuation and accounting, or

(b) division of proceeds either by the pension plan administrator or by the employee spouse.

[Page 41]

[Proposed legislation, s. 18.2(1)]

Recommendation No. 20

We recommend

(a) that the proposed legislation establish an order of preference among the proposed methods of division,

(b) that the order or preference be as follows: (1) valuation and accounting, (2) valuation and division, (3) provision of a separate pension for the non-employee spouse, (4) division of proceeds by the pension plan administrator, and (5) division of proceeds by the employee spouse, and

(c) that a method of division later in the order of preference be adopted only if all methods earlier in the preference are inapplicable or beyond the Court's jurisdiction or would cause a result which would not be just and equitable; provided that the order of preference need not be followed if following it would cause hardship.

[Page 48]

[Proposed legislation,

s. 18.2(1), (7)]

Recommendation No. 21.

We recommend that, before vesting, a pension benefit, subject to any necessary adjustment for potential income tax liability, at the amount of any which the employee spouse would at the time of division of the matrimonial property be entitled to receive if his employment would be terminated at that time.

[Page 51]

[Proposed legislation, s. 18.4]

Recommendation No. 22.

We recommend that under a defined contribution pension plan the value of an employee spouse's pension benefit be the amount of contributions and interest held for the employee spouse's account, including the vested portion of the employer's contributions and interest.

[Page 51]

[Proposed legislation, s. 18.5]

Recommendation No. 23.

We recommend that under a defined benefit plan where the employee spouse has a vested right to a deferred pension the pension benefit be valued at the greater of

(a) the amount that the employee spouse would be entitled to if his participation in the pension plan had terminated immediately before the time of the valuation, and

(b) the present value of the normal pension which the pension plan would provide on the employee spouse's normal retirement date under the plan, or of the pension which an employee spouse has elected to take.

[Page 54]

[Proposed legislation, s. 18.5]

Recommendation No. 24.

We recommend:

(1) that regulations be promulgated under the Pension Benefits Act or its successor Act and under the public sector pension statutes:

(a) adopting annually interest and discount rates to be used in valuing vested deferred annuities under defined benefit pension plans and providing tables of values for such deferred annuities.

(b) requiring a pension plan administrator, upon requisition by a spouse involved in negotiating or litigating the division of matrimonial property upon marriage breakdown, or upon an order of the Court, to provide in prescribed form the information necessary to determine the present value of the employee's normal retirement annuity.

(2) that the regulations be promulgated by the responsible Ministers after receiving the advice of an advisory committee which should include the officials charged with the administration of the pension legislation and persons expert in the disciplines involved in the valuation of deferred annuities.

[Page 55]

[Proposed legislation s. 18.9]

Recommendation No. 25.

We recommend that, if the law is changed to provide that upon termination of employment an employee is by law entitled to have an amount of money representing his pension benefit under a defined benefit pension plan transferred to another pension vehicle, an employee spouse's pension benefit shall be valued at that amount for the purposes of division upon marriage breakdown.

[Page 56]

Recommendation No. 26.

We recommend that if an employee spouse is already receiving a pension under a pension plan at the time of the division of matrimonial property, the pension benefit be the present value of the pension.

[Page 57]

[Proposed legislation, s. 18.5(2)]

Recommendation No. 27.

We recommend that a valuation made under Recommendation 23and Recommendation 24 or under or under Recommendation 25 be binding for the purposes of a valuation and division.

[Page 58]

[Proposed legislation, s. 18.5(1)]

Recommendation No. 28.

We recommend that a valuation made under Recommendations 23 and 24 or under Recommendation 25 or Recommendation 26 be binding for the purposes of a valuation and accounting.

[Page 58]

[Proposed legislation, s. 18.4, 18.5]

Recommendation No. 29.

We recommend that in determining the amount of a separate pension for a non-employee spouse a pension plan administrator value the pension which the employee spouse could claim and the pension to be provided for the non-employee spouse in the same manner as similar valuations would be made under the pension plan for the purpose of determining the amount of alternate optional forms of pension for employees and their spouses.

[Page 59]

Recommendation No. 30.

We recommend that the Matrimonial Property Act be amended to confirm that an employee spouse's pension benefit which began to accrue before the marriage can be pro-rated over the pre-marriage and marriage years.

[Page 60]

[Proposed legislation,
s. 18.7]

Recommendation No. 31.

We recommend that no allowance shall be made upon a valuation and division for the possibility that the employee spouse will not live until the commencement of a pension or for the possibility that one pension fund may not be sufficient to pay all pensions charged upon it.

[Page 62]

[Proposed legislation,
s. 18.8]

Recommendation No. 32.

We recommend that upon a valuation and accounting no allowance shall be made for the possibilities mentioned in Recommendation 31 unless a valuation without such an allowance would not be just and equitable.

[Page 62]

[Proposed legislation,
s. 18.8]

Recommendation No. 33.

We tentatively recommend that upon a valuation and accounting a deduction may be made for the potential effect of income tax, if any.

[Page 63]

[Proposed legislation,
s. 18.2(1)(a), s. 18.4]

Recommendation No. 34

We recommend that the proposed legislation provide for the amendment of all pension plans to provide for the division of pension benefits in accordance with the Matrimonial Property Act.

[Page 56]

[Proposed legislation,
s. 3(1)]

Recommendation No. 35

We recommend that the government of Alberta pursue with the federal government discussions leading to the continuation of tax deferral for the proceeds of a valuation and division in the event that section 60(j) of the Income Tax Act is repealed or made inapplicable to them.

[Page 68]

PART IV: PROPOSED LEGISLATION

*MATRIMONIAL PROPERTY AMENDMENT ACT, 19_*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1 *The Matrimonial Property Act is amended by this Act.*

NOTE: 1 This Bill will amend chapter M-9 of the Revised Statutes of Alberta 1980.

[Recommendation 2, page 13]

2 *The following is added after Part 1:*

PART 1.1

DIVISION OF PENSION BENEFITS

18.1(1) In this Part,

(a) "non-participant spouse" means a spouse as defined in section 1(e) who is or was the spouse of a participant spouse;

(b) "non-participant spouse's share" means the share

of the participant spouse's pension benefit that the Court distributes to the non-participant spouse;

(c) "participant spouse" means a person who is a party to a matrimonial property order or an application for a matrimonial property order, and

(i) who contributes or has contributed to a pension plan, or

(ii) on whose behalf contributions are made or have been made to a pension plan;

(d) "pension benefit" means every right of a participant spouse or his nominee to receive a benefit under a pension plan on retirement, death, or termination of the participant spouse's particpation in the pension plan;

(e) "pension plan" means

(i) a pension plan as defined in the Pension Benefits Act that is required to be registered under that Act,

(ii) a pension plan established or continued under

(A) the Alberta Government Telephones Act,

(B) the Local Authorities Pension Plan Act,

(C) the Members of the Legislative Assembly Pension Plan Act,

(D) the Public Service Management Pension Plan Act,

(E) the Public Service Pension Plan Act,

(F) the Special Forces Pension Plan Act,

(G) the Teachers' Retirement Fund Act, or

(H) the Universities Academic Pension Plan Act

or under any Act that is a successor to an Act referred to in paragraphs (A) to (H);

(iii) a pension plan

(A) that is required to be registerd under an Act similar to the Pension Benefits Act in another province that is designated under the Pension Benefits Act as a province in which there is in force legislation substantially similar to the Pension Benefits Act, and

(B) that is subject to an agreement entered into under section 5 of the Pension Benefits Act;

(iv) a pension plan that is required to be registered under the Pension Benefit Standards Act (Canada);

(v) a pension plan that is established or registered by or under the laws of another

jurisdiction that recognizes this Act or an order made under this Act;

(f) "pension plan administrator" means a person who administers or is responsible for the administration of a pension plan and any pension fund established under the pension plan that provides for a pension benefit and includes a Minister charged with the administration of a pension plan or pension fund.

(2) Where there is a conflict between the provisions of this Part and the provisions contained in the statutes referred to in subsection (1)(e)(i) and (ii) or a pension plan referred to in subsection (1)(e), the provisions of this Part prevail.

[Recommendation 5, page 16]

18.2(1) for the purposes of making a distribution under sections 7 and 9 of the pension benefit of a participant spouse the Court may, subject to subsection (2), do the following:

(a) where it is just and equitable, order a participant spouse to pay money to or transfer an interest in property to the non-participant spouse after taking into consideration the present value of the pension benefit subject to any deduction allowed by the Court for tax liability that the participant spouse might incur when he receives the proceeds of the pension benefit,

(b) if

(i) it is not just and equitable to make an order under clause (a), and

(ii) the participant spouse has not started to receive a pension under the pension plan,

order a pension plan administrator to pay for the benefit of the non-participant spouse the present value determined from the certificate issued under section 18.9 of the non-participant spouse's share of the pension benefit unless that payment would prejudice the rights of other persons who have an interest in the pension plan and its fund;

(c) if it is not just and equitable to make an order under clause (a) or (b), order a pension plan administrator to provide for the non-participant spouse, on or after the earliest date at which the participant spouse could claim a pension but no later than the date on which the participant spouse starts to receive a pension under the pension plan, a pension of the kind provided for under the pension plan having an actuarial value that is not greater than the non-participant spouse's share of the pension that the participant spouse could have claimed at the same date;

(d) if it is not just and equitable to make an order under clause (a), (b) or (c), order a pension plan administrator to pay to the non-participant spouse the non-participant spouse's share of the proceeds of the

pension benefit that would otherwise be payable to the participant spouse as and when a payment of proceeds falls due;

(e) if it is not just and equitable to make an order under clause (a), (b), (c) or (d),

(i) order the participant spouse to pay to the non-participant spouse the non-participant spouse's share of the proceeds of the pension benefit as and when the proceeds are received by the participant spouse, and

(ii) impose upon the participant spouse a trust in favour of the non-participant spouse with respect to the non-participant spouse's share.

[Recommendation 7, page 19,
Recommendation 8, page 21,
Recommendation 10, page 27,
Recommendation 11, page 29,
Recommendation 19, page 41,
Recommendation 20, page 48,
Recommendation 33, page 63]

(2) An order

(a) made under subsection (1)(b) or (c) shall be made

(i) notwithstanding anything contained in any statute referred to in section 18.1(e), and

(ii) only where

(A) the participant spouse's pension benefit includes a vested right to a deferred annuity, and

(B) the participant spouse is not receiving an annuity arising out of the pension benefit referred to in paragraph (A),

or

(b) made under clause (d) shall be made notwithstanding anything contained in any statute referred to in section 18.1(e).

[Recommendation 5, page 16, Recommendation 8(a), page 21]

(3) A person making an application under which an order may be granted under subsection (1)(b) shall give notice of the application to the pension plan administrator.

[Recommendation 9, page 23]

(4) Where

(a) an application is to be made under which an order may be granted under subsection (1)(b), and

(b) the pension plan administrator is of the opinion that the making of a payment referred to in subsection (1)(b) would prejudice the rights of other persons who have an interest in the pension plan and its fund,

the pension plan administrator may issue a certificate stating that a payment made pursuant to an order granted under subsection (1)(b) would prejudice the rights of other persons who have an interest in the pension plan and its fund.

[Recommendation 9, page 23]

(5) A certificate issued under subsection (4) is admissible in evidence as prima facie proof of its contents without proof of the signature or position of the person issuing the certificate.

[Recommendation 9, page 23]

(6) Where a certificate is issued under subsection (4), the Court shall not grant an order under subsection (1)(b) unless the Court, after hearing the representations of the pension plan administrator, is satisfied that the payment made pursuant to an order granted under subsection (1)(b) would not prejudice the rights of other persons who have an interest in the pension plan and its fund.

[Recommendation 9, page 23]

(7) In order to avoid a hardship the Court may make an order under subsection (1) without taking into consideration the priority established under subsection (1) for making that order.

[Recommendation 20, page 48]

(8) An order made under subsection (1)(d) or (e) continues to apply notwithstanding the death of the non-particpant spouse.

(9) In an order made under subsection (1)(c), (d) or (e), the Court may, notwithstanding that a person other than the

non-participant spouse is designated as the beneficiary of a death benefit payable under a pension plan, divide as part of the procceds of the pension benefit any part of the death benefit which is not an extra benefit payable by reason of the existence of a child or other spouse of the participant spouse.

[Recommendation 13, page 34,
Recommendation 14, page 34,
Recommendation 15, page 35]

(10) Where an order is made under subsection (1)(d) or (e), the participant spouse shall not make an election under the pension plan without

(a) the consent of the non-participant spouse, or

(b) when the non-participant spouse neglects or refuses to give consent, the approval of the Court.

[Recommendation 12, page 31]

(11) Notwithstanding subsection (10), where an election under the pension plan relates to the participant spouse's employment the approval of the Court shall not be withheld if the election is being made in good faith.

[Recommendation 12, page 31]

(12) The Court may

(a) at the time it makes an order under subsection (1)(c), (d) or (e), or

(b) at any time after it makes an order under

subsection (1)(c), (d) or (e) but before a pension is payable to the participant spouse or the non-participant spouse,

make an order under subsection (1)(b) that, in the event that the participant spouse transfers his pension benefit or dies, will come into effect and supersede the order made under subsection (1)(c), (d) or (e), as the case may be.

[Recommendation 17, page 38]

18.3 An actual or prospective change in the amount of a pension benefit that is or might be caused by an event that has occurred or may occur after the date fixed by the Court for the division of the property shall not be taken into consideration in the distribution of a pension benefit under this Act.

[Recommendation 2, page 13,
Recommendation 3, page 14]

18.4(1) If a participant spouse's pension benefit does not include a vested right to a present or deferred annuity under a pension plan, the value of his pension benefit for the purposes of this Act shall, subject to any deduction allowed by the Court for tax liability that the participant spouse might incur

(a) if his employment is terminated, or

(b) when he receives the proceeds of the pension benefit,

be equal to the amount that the participant spouse would be entitled to under the pension plan if his participation in the pension plan had terminated immediately before the time fixed by the Court for the division of the property.

(2) If under a pension plan vesting is unreasonably deferred, a Court may make an order under section 18.2(d) or (e).

[Recommendation 18, page 41,
Recommendation 20, page 48,
Recommendation 33, page 63]

18.5(1) If a participant spouse's pension benefit includes a vested right to a deferred annuity, the value of his pension benefit for the purposes of this Act is the greater of

(a) the amount that the participant spouse would be entitled to if his participation in the pension plan had terminated immediately before the time of the valuation, and

(b) the amount

(i) of the present value of the deferred annuity, where the amount of the deferred annuity is prescribed by the pension plan, or

(ii) credited to the participant spouse's pension account, where the amount of the deferred annuity is determined by the amount credited to the account.

[Recommendation 22, page 51,
Recommendation 23, page 54]

(2) If a participant spouse has started to receive an annuity under a pension plan, the value of his pension benefit for the purposes of this Act is the present value of the annuity.

[Recommendation 26, page 57]

18.6 If under a pension plan the participant spouse is entitled to elect but has not yet elected a pension benefit from among retirement annuities or other benefits having different present values, the present value of the normal annuity at the normal retirement age as provided for under the pension plan shall be used as the basis for valuing the pension benefit.

[Recommendation 23(b), page 54]

18.7(1) Section 7(3) does not apply where

(a) a portion of the participant spouse's pension benefit was acquired before the marriage, and

(b) the determination of the value of the pension benefit is based on the present value of the deferred annuity.

(2) For the purposes of determining the value of the pension benefit based on the present value of the deferred annuity where a portion of the participant spouse's pension

benefit was acquired before the marriage, that part of the present value of the pension benefit that bears the same proportion to the present value of the whole of the pension benefit as the length of time that the participant spouse participated in the pension plan before the marriage bears to the total length of time that the participant spouse has participated in the pension plan up to the date fixed by the Court for the distribution of the property is exempted from distribution under this Act.

[Recommendation 30, page 60]

18.8 In making a valuation of a pension benefit no allowance shall be made for the possibility that

(a) the participant spouse may die before the commencement of the annuity under the pension plan, or

(b) the pension fund under the pension plan may not be sufficient to pay all the annuities payable under the pension plan,

except where the Court considers it just and equitable to do so in respect of making an order under section 18.2(1)(a).

[Recommendation 30, page 60,
Recommendation 31, page 62]

18.9(1) A pension plan administrator shall, pursuant to an order of the Court or on a request made by or on behalf of a person who is a party to an action for the distribution of matrimonial property, issue a certificate setting forth the information that is necessary to determine

(a) the benefits to which the participant spouse would be entitled on the termination of his participation in the pension plan,

(b) the amount and the prospective commencement date of any deferred annuity in which the participant spouse has a vested right,

(c) the present value

(i) of

(A) the normal annuity that will be provided the participant spouse at his normal retirement date as provided for under the pension plan, or

(B) the annuity being received by the particpant spouse,

as the case may be, and

(ii) any other annuities specified by regulation, and

(d) the amount

(i) of the contributions made under the pension plan by the participant spouse,

(ii) of the contributions, if any, made under the pension plan by the participant spouse's employer that are made for the benefit of the participant spouse and in which the participant spouse has a

vested interest, and

(iii) of any interest earned on the contributions as provided for under the pension plan.

(2) If an application is made under which the Court may, under section 18.2(12), make an order under section 18.2(1)(b) to come into effect in the event that the participant spouse transfers his pension benefit or dies, the information

(a) provided under subsection (1)(a), (b) and (d) of this section shall relate to

(i) the pension benefit,

(ii) the participant spouse's right to a deferred annuity, and

(ii) contributions,

as at the date of the division of the matrimonial property, and

(b) provided under subsection (1)(c) of this section shall relate to the present value of

(i) the normal annuity to be provided to the participant spouse under the pension plan, and

(ii) any other annuities specified by the regulations,

plus the amount of the interest earned on the contributions

as of the date that the information is given.

(3) A certificate issued under subsection (1) and its contents are admissible in evidence in respect of a distribution of property under this Act without proof of the signature or position of the person issuing the certificate.

(4) The Lieutenant Governor in Council may make regulations

(a) prescribing interest rates and discount rates to be used by a pension plan administrator for determining the value of pension benefits for the purpose of providing information under subsection (1);

(b) prescribing tables setting out values of pension benefits based on the rates prescribed under clause (a);

(c) prescribing the information to be provided by a pension plan administrator under subsection (1);

(d) prescribing the form of certificates that are to be provided under subsection (1);

(e) requiring that the amount payable under section 18.2(1)(b) be paid by the pension plan administrator into a plan that will provide a retirement income for the non-participant spouse;

(f) prescribing the conditions under which a payment referred to in clause (e) shall be held in trust for the non-participant spouse under a plan that provides for a deferred annuity or a registered retirement

savings plan or by an agency referred to in section 9 of the Pension Benefits Act;

(g) governing the determination of the residual pension benefit of a participant spouse after the division of a pension benefit under section 18.2(1)(b) or the provision of a separate pension under section 18.2(1)(c).

[Subsection (4)(a) to (f) are based upon Recommendation 24, page 55.

Subsection (4)(g) is based upon Recommendation 8, page 21]

(5) The Minister may appoint a committee that shall include an actuary and an accountant to advise him on interest rates and discount rates to be prescribed under subsection (3)(a) and on matters to be prescribed under subsection (3)(b) and (c).

[Recommendation 24, page 55, and see paragraph 3.24.]

NOTE 2 Division of pension benefits.

3(1) Every pension plan administrator as defined in section 18.1 of the Matrimonial Property Act shall ensure that the pension plan that he administers is amended so that the pension plan provides for the division of the pension benefits in accordance with the Matrimonial Property Act.

(2) To the extent that a pension plan is not amended so that it provides for the division of pension benefits in accordance with the Matrimonial Property Act the pension plan shall be deemed to

be amended so as to provide for the division of pension benefits in accordance with the Matrimonial Property Act.

[Recommendation 34, page 66]

NOTE: 3 Amendment to pension plans.

4 This Act comes into force on Proclamation.

NOTE: 4 Coming into force.

PART V: RECOMMENDATIONS NOT IMPLEMENTED BY THE PROPOSED LEGISLATION

Recommendation No. 25.

We recommend that, if the law is changed to provide that upon termination of employment an employee is by law entitled to have an amount of money representing his pension benefit under a defined benefit pension plan transferred to another pension vehicle, an employee spouse's pension benefit shall be valued at that amount for the purposes of division upon marriage breakdown.

Recommendation No. 29.

We recommend that in determining the amount of a separate pension for a non-employee spouse a pension plan administrator value the pension which the employee spouse could claim and the pension to be provided for the non-employee spouse in the same manner as similar valuations would be made under the pension plan for the purpose of determining the amount of alternate optional forms of pension for employees and their spouses.

Recommendation No. 35

We recommend that the government of Alberta pursue with the federal government discussions leading to the continuation of tax deferral for the proceeds of a valuation and division in the event that section 60(j) of the Income Tax Act is repealed or made inapplicable to them.

APPENDIX A

SPECIMEN ORDER FOR VALUATION AND DIVISION

UPON IT APPEARING that E is the holder under (describe pension plan), hereinafter called "the plan", of a pension benefit as defined in the Matrimonial Property Act;

AND UPON IT APPEARING that it is just and equitable that *% of the rights constituting the pension benefit as the same existed at (here insert the date of division), hereinafter called "the date of division", be distributed to S;

AND IT APPEARING THAT S's said share of the pension benefit has a value of $X;

IT IS HEREBY ORDERED that the administrator of the plan pay (to or to the order of S) (for the benefit of S to a locked in registered retirement savings plan or registered pension plan) under section 18.2(1)(b) of the Matrimonial Property Act the sum of $Y in satisfaction of S's said share.

AND IT IS HEREBY ORDERED AND DECLARED that upon paying the said sum as aforesaid the administrator shall be entitled to adjust E's pension account to reflect E's residual pension benefit after the payment, the adjustment to be made pursuant to the regulations made under section 18.9(3)(g) of the Matrimonial Property Act.

AND IT IS FURTHER ORDERED AND DECLARED that upon the payment of the said sum as aforesaid, the administrator, the plan and the

pension fund under the plan shall be discharged from all liability for *% of E's pension benefit as the same existed at the date of division.

AND IT IS FURTHER ADJUDGED AND DECLARED that until full payment is made under this order E holds his rights under the plan in trust for the payment.

AND IT IS FURTHER ORDERED that at any time before the administrator makes payment in full under this Order a party or the administrator may apply for further directions in oder to give effect to the distribution effected by this Order.

APPENDIX B

SPECIMEN ORDER FOR PROVISION OF SEPARATE PENSION

UPON IT APPEARING that E is the holder under (describe pension plan), hereinafter called "the plan", of a pension benefit as defined in the Matrimonial Property Act;

AND UPON IT APPEARING that it is just and equitable that *% of the rights constituting the pension benefit as the same existed at (here insert the date of division), hereinafter called "the date of division", be distributed to S;

IT IS HEREBY ORDERED AND DECLARED that the administrator of the plan shall provide S with a pension on the following terms and conditions:

(1) the pension shall commence (on the * day of *) (on the * day of * or on the date upon which E commences to receive a pension or annuity under the plan, whichever is earlier);

(2) the pension shall be of a kind or form which is chosen by S from among those which the plan provides for its members but shall not be payable to any person but S or S's personal representatives; and

(3) the actuarial value of the pension shall be *% of the pension of the same kind or form to which E would, upon retirement at the date of commencement of the pension, be entitled for (his) (her) pensionable service and pensionable earnings to the date of division.

AND IT IS FURTHER ORDERED AND DECLARED that, upon making provision for the pension for S provided for in this Order, the administrator of the plan shall be entitled to adjust E's pension account pursuant to the regulations made under section 18.9(3)(g) of the Matrimonial Property Act account to reflect E's residual pension benefit after the provision of the separate pension.

AND IT IS FURTHER ORDERED that if E shall decide to transfer his rights under the plan to another pension plan the said administrator shall deduct from the proceeds of such rights and shall pay (to or to the order of S) (into a registered retirement savings plan or registered retirement plan in accordance with the regulations under the Matrimonial Property Act) an amount equal to the then value of S's share of the normal deferred pension which E would otherwise have received, such value to be determined by agteement of the pension plan administrator and the parties or their personal representatives or by further order. under the plan.

AND IT IS FURTHER ORDERED AND DECLARED that if E dies before a separate pension is provided for S pursuant to this Order, S shall be entitled to receive that portion of any death benefit payable to E's personal representatives or to any other person which bears the same proportion to the whole of the death benefit as * years bears to E's total years of pensionable service under the plan up to the time of E's death.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECLARED that until but not after a separate pension is provided for S under this Order, E holds rights under the plan in trust for S to the extent of the portion which S is entitled to receive under this order.

AND IT IS FURTHER ORDERED that a party or the administrator may apply for further directions in order to give effect to the distribution of E's rights which is made by the Order.

APPENDIX C

SPECIMEN ORDER FOR DIVISION OF PROCEEDS

UPON IT APPEARING that E is the holder under (describe pension plan), hereinafter called "the plan", of a pension benefit as defined in the Matrimonial Property Act;

AND UPON IT APPEARING that it is just and equitable that *% of the rights constituting the pension benefit as the same existed at (here insert the date of division), hereinafter called "the date of division", be distributed to S by way of division of the proceeds of the pension benefit but that it is not possible at this time to determine what the proceeds of the pension benefit will be or when they will be paid;

IT IS HEREBY ORDERED AND DECLARED THAT S is entitled to receive a share of *% of the proceeds of E's pension benefit under the plan as the same existed at the date of division.

AND IT IS FURTHER ORDERED AND DECLARED that if the proceeds are received by E in the form of the normal pension provided under the plan commencing on the normal retirement date provided for in the plan S's share will be $X per annum, being Y% of the normal pension of $Z which would be payable to E by reason of his pensionable service and pensionable earnings up to the date of division.

AND IT IS FURTHER ORDERED AND DECLARED that if the proceeds are received by E in the form of another type or form of pension provided under the plan S's share will be that amount which bears

to same proportion to the annual amount of the pension of that type or form as $X bears to $Z.

AND IT IS FURTHER ORDERED that E shall pay over S's share of every payment of proceeds which E shall receive from time to time, including any pension and any other benefits paid to E under the plan, forthwith upon receipt of the payment.

AND IT IS FURTHER ORDERED that E shall not name a beneficiary or exercise any right of choice or election under the plan without the consent of S or, if such consent is refused, without the approval of the Court.

(AND IT IS FURTHER ORDERED that the administrator of the plan shall deduct S's share from each pension payment or other proceeds of E's pension benefit and forthwith pay the same to S.)

AND IT IS FURTHER ORDERED that if E shall decide to transfer his rights under the plan to another pension plan the said administrator or administrative body shall deduct from the proceeds of such rights and shall pay (to or to the order of S) (into a registered retirement savings plan or registered retirement plan in accordance with the regulations under the Matrimonial Property Act) an amount equal to the then value of the normal deferred pension which S would otherwise receive under this order, such value to be determined by agteement of the pension plan administrator and the parties or their personal representatives or by further order.

AND IT IS FURTHER ORDERED AND ADJUDGED that E holds in trust for payment of S's share the pension benefit and all proceeds thereof which may be paid or payable to E from time to time,

including all persons paid thereunder and all other benefits.

AND IT IS FURTHER ORDERED that a party or the administrator may apply for further directions in order to give effect to the distribution of E's rights which is made by this Order.

APPENDIX D: LIST OF COMMENTATORS

The following commented upon Report for Discussion 2:

Alberta Treasury

R.G. Buck, Chief Actuary, Ministry of Government Services, Government of Ontario

Canadian Bar Association, Alberta Branch, Family Law Subsection

Canadian Commercial Workers Industry Pension Plan

Canadian Institute of Actuaries, Actuarial Evidence Committee

Canadian Utilities Limited

Dr. Larry Eberlein

Wes Peters, Superintendent, Pension Commission, Department of Labour, Government of Manitoba

Petro-Canada Inc.

Louison Ross, President, Commission administrative des regimes de retraite et d'assurance, Gouvernement du Quebec

Kenneth W. Wilk, Senior Pension and Benefits Analyst, Public Employee Benefits Agency, Government of Saskatchewan

YWCA Calgary